ORIGINAL

90-7435

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES LEE SPENCER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The petitioner, James Lee Spencer, asks leave to file the attached petition for a writ of certiorari to the Supreme Court of the State of Georgia without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been granted leave to so proceed in the Supreme

No. 91-_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

JAMES LEE SPENCER,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

I, JAMES LEE SPENCER, being first duly sworn, depose and say:

I am the petitioner in the above-entitled case; that in support of my motion to proceed on petition for a writ of certiorari to the Supreme Court of the State of Georgia without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on petition

Court of the State of Georgia. Petitioner's affidavit in support of this motion is attached hereto.

Dated: New York, New York
March 18, 1991

MORRISON & FOERSTER

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-and-

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Attorneys for Petitioner

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N63836

for a writ of certiorari to the Supreme Court of the State of Georgia are the following:

QUESTIONS PRESENTED

I. WHETHER A STATE MAY USE AN EVIDENTIARY RULE OF JUROR INCOMPETENCE TO PRECLUDE CONSIDERATION OF A CAPITAL DEFENDANT'S CLAIM THAT RACE IMPERMISSIBLY AFFECTED HIS SENTENCE OF DEATH IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

II. WHETHER A STATE CAN RELY SOLELY ON THE UTLIMATE RACIAL COMPOSITION OF A DEFENDANT'S JURY TO PRECLUDE THAT DEFENDANT FROM ESTABLISHING A PRIMA FACIE CASE OF RACIAL DISCRIMINATION UNDER BATSON V. KENTUCKY.

III. WHETHER A STATE COURT MAY CIRCUMVENT THIS COURT'S MANDATE IN BECK V. ALABAMA BY REINTERPRETING ITS STATE'S SUBSTANTIVE CRIMINAL LAW ON A CASE-BY-CASE BASIS TO PRECLUDE THE AVAILABILITY OF A LESSER INCLUDED OFFENSE AS A MATTER OF LAW.

IV. WHETHER A STATE COURT MAY PREVENT A CAPITAL DEFENDANT FROM INTRODUCING RELEVANT MITIGATING EVIDENCE IN THE SENTENCING PHASE BY DENYING A SHORT CONTINUANCE TO PERMIT A MITIGATION WITNESS TO ARRIVE AND TESTIFY.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

   No. My last employment was in 1969. I do not recall how much I was paid per month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other source?

   No.

3. Do you own any cash or checking or savings account?

   No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

   No.

5. List the persons who are are dependent upon you for support and state your relationship to those persons:

   None.

6. I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

James Lee Spencer
JAMES LEE SPENCER

Subscribed and Sworn to before me this 13th day of March, 1991.

Harriet P. Morris
Notary Public

My Commission Expires:

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefor.

Associate Justice

M60257

ORIGINAL

No. 90-7435

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THE STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner, James Lee Spencer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Georgia entered in this case.

OPINION BELOW

The opinion of the Supreme Court of Georgia was announced on November 21, 1990. Spencer v. State, 260 Ga. 640, 398 S.E.2d 179 (1990). A copy of the opinion is reproduced in the Appendix at a1 to a25.

JURISDICTION

The judgment of the Georgia Supreme Court was entered on November 21, 1990. Petitioner filed a timely petition for reconsideration which was denied on December 19, 1990. A copy of the Order denying Petitioner's Motion for Reconsideration is reproduced in the Appendix at a26. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257, petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provisions are the Eighth and Fourteenth Amendments of the United States Constitution, which are reproduced in full in the Appendix at a42 to a44. Also relevant are the Official Code of Georgia §§ 16-5-1, 16-5-2, and 17-9-41, and Georgia Uniform Superior Court Rule 34, reproduced in relevant part in the Appendix at a45 to a50.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

In January 1975, petitioner James Lee Spencer was convicted of aggravated assault, murder and escape and sentenced to death in the Superior Court of Burke County,

Georgia. On direct appeal, the Georgia Supreme Court affirmed. Spencer v. State, 236 Ga. 697, 224 S.E.2d 910, cert. denied, 429 U.S. 932 (1976).

Mr. Spencer filed a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. After an evidentiary hearing, the Superior Court denied relief and the George Supreme Court affirmed. Spencer v. Hopper, 243 Ga. 532, 255 S.E.2d 1, cert. denied, 444 U.S. 855 (1979).

Mr. Spencer then filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Georgia, and the court denied relief. Mitchell v. Hopper, 538 F. Supp. 77 (S.D. Ga. 1982). On appeal, a panel of the United States Court of Appeals for the Eleventh Circuit vacated the judgment below and remanded for further proceedings. Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983). Upon rehearing en banc, the Court of Appeals withheld the panel's decision, reversed the decision below, and remanded for further proceedings. Spencer v. Kemp, 729 F.2d 1293, 781 F.2d 1458 (11th Cir. 1986). On remand the District Court found that Mr. Spencer's conviction and sentence of death were the result of a racially discriminatory jury selection process. It issued an order directing that Mr. Spencer be released from custody unless the State of Georgia retired and convicted him within

180 days. Spencer v. Kemp, CV-179-247 (S.D. Ga. Mar. 31, 1987).

Mr. Spencer was retried in Burke County, Georgia and convicted of aggravated assault, murder and escape and sentenced to death on September 3, 1987. On direct appeal, the Georgia Supreme Court, by order dated May 25, 1989, remanded to the Superior Court for a hearing in view of this Court's decision in Johnson v. Mississippi, 486 U.S. 578 (1988). Following the remand hearing, the Georgia Supreme Court affirmed Mr. Spencer's convictions and sentence of death. Spencer v. State, Appendix at a1, 260 Ga. 640, 398 S.E.2d 179 (1990).

B. Material Facts

On October 31, 1974, Mr. Spencer, a twenty-four year old black man, was serving a life sentence in the Georgia state prison in Reidsville, Georgia. At that time Reidsville was tense, overcrowded and dangerous and, despite a federal court order requiring integration throughout the Georgia State prison system, remained a racially segregated facility. Tr. at 869-70; R. at 854-59. Mr. Spencer sought to escape from this explosive atmosphere, first in May 1974, and again on October 31, 1974. Tr. at 1086; R. at 2.

The second escape attempt occurred while Mr. Spencer was being transported to Reidsville by a deputy sheriff, Hunter Beazley, and the deputy's father-in-law,

Lett Williams. Mr. Spencer had secreted a homemade handcuff key and a gun on his person to facilitate his escape. As the deputy drove through Waynesboro, Georgia, a call came over the police radio speaker informing the deputy that his prisoner had a gun. As the deputy reached toward his .357 Magnum on the dashboard, Mr. Spencer panicked and began shooting, hitting the deputy. The car stopped, and Beazley and Williams both got out of the car, on the ground and out of the line of fire. Beazley's gun remained on the dashboard. A witness at the scene testified that he heard Beazley, lying on the ground, tell Williams, "Get the gun and help me." R. at 924-26. Williams started back into the car and began to reach toward the gun. R. at 926. Mr. Spencer warned Williams to stay away. As Williams lunged toward the gun, Mr. Spencer shot him. Tr. at 712-13, 716-17.

Given that Mr. Spencer's first conviction has been reversed because of a racially discriminatory jury selection process and the long history of racial problems in Burke County,[1] a careful sensitivity to avoiding racial considerations during Mr. Spencer's second trial was essential. Unfortunately, that did not happen. On several occasions during voir dire, the trial court interfered with the defense counsel's attempts to elicit indications of

---

1 See Rogers v. Lodge, 458 U.S. 613, 624-26 (1982).

racial bias. E.g., Tr. at 43, 266-67. Once the venire had been chosen, the prosecutor struck a total of nine jurors, all of whom were black. Despite this overwhelming pattern of racially discriminatory strikes, the trial court stated that he saw no evidence of any violation of this Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986):

> THE COURT: Of course, I advised counsel about that [Batson] in the beginning, and I saw no evidence of that. If you want to make any record, I'll let you make it at this time.
>
> MR. ALLEN: Your Honor, I would like to just reserve that objection, if I may. I really haven't had a chance to even consider it at this moment in time.
>
> THE COURT: All right, sir, there's no objection at this time. All right.

Tr. at 617-18 (emphasis added).

At trial, Mr. Spencer took the stand and described the circumstances of the crime. He did not deny that he intentionally fired the shot that killed Williams, but denied that he acted with any malice or that he even wanted or planned to kill anyone. He further testified that he warned Williams to get away from the car, Tr. at 847, and shot him in panic only when Williams reached for Beazley's loaded .357 Magnum pistol on the front of the dashboard, Tr. at 847, 850-51. Mr. Spencer's version of events was corroborated by other witnesses called by the State. Despite repeated requests by defense counsel, however, the

trial court refused to charge the jury for the noncapital offense of voluntary manslaughter. Tr. at 889-90, 896.

Mr. Spencer's jury returned a verdict of malice murder at approximately 12:30 p.m. on September 3, 1987. Tr. at 945. The sentencing phase began immediately after the lunch break that same day. Tr. at 946. Mr. Spencer's principal mitigation witness was Leah Kirtland, a woman living in Portland, Oregon, who had come to know Mr. Spencer over a ten year period through correspondence, telephone calls and visits to the prison. Appendix at a32 to a35; see Transcript of Hearing on Motion for New Trial, dated September 22, 1988 at 103 ("9/22/88 Tr."). Ms. Kirtland was flying in on the afternoon of September 3, as defense counsel expected her testimony to be required on the next day during the sentencing phase.

On the day Ms. Kirtland was to arrive, it became apparent that the trial would end sooner than either defense counsel or the trial court had expected. Tr. at 611, 946-52. Defense counsel informed the trial court at the beginning of the sentencing phase of Ms. Kirtland's anticipated arrival and requested a brief continuance to permit her to testify after she arrived that day on a 3:55 p.m. flight. Tr. at 947-52. The trial court refused, more concerned with the potential inconvenience to the trial

spectators and television cameras than with Mr. Spencer's right to present mitigating evidence:

> The question here is we've got all of these other people that are indisposed as a result of what's happening here and they've been here as many days as they've been here listening to the jury being selected and listening to the trial of the case and they're here and all of the people are here guessing about a verdict.

Tr. at 948. When defense counsel continued to press for a continuance, the trial court again refused, stating the following reason for the record:

> This case, I guess it's been pending for a long period of time. It's been hanging [around] for too many years and it's got to be disposed of.

Tr. at 973-74. Ms. Kirtland arrived during defense counsel's closing argument. Tr. at 871. The court was informed of Ms. Kirtland's presence, Tr. at 1026, but failed to reopen the record to permit her to testify. After deliberating briefly, the jury sentenced Mr. Spencer to death. Tr. at 1028-29.

After the trial, Mr. Spencer's trial counsel withdrew and new counsel made a motion for new trial. As part of that motion, Mr. Spencer renewed the previously reserved Batson objection, and the trial court considered and rejected that claim on the merits. R. at 201-02, 242-43, 722-23, 892. Mr. Spencer also submitted the affidavit of a juror demonstrating that racial

discrimination was an important factor in the jury's decision to convict and sentence him to death. The affidavit stated:

> During jury deliberations in the guilt/innocence phase, a white female juror made racially derogatory statements in the jury room, including the statement, referring to the defendant, that "A nigger deserves to be dead." . . . Another white juror . . . also made similar racially derogatory comments about the defendant during jury deliberations. I have personally known [that juror] for many years and believe him to be racially prejudiced.
>
> Based on those juror statements and my observations as a juror in the jury room, I know that defendant's race was an important factor in certain juror's decisions to convict defendant and sentence him to death.

Appendix at a30 to a31. The trial court refused even to consider this evidence and summarily rejected Mr. Spencer's Equal Protection and Eighth Amendment claims.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal issues that Mr. Spencer raises in this petition concern fundamental Constitutional rights under the Eighth and Fourteenth Amendments to the United States Constitution. All of these issues were presented to the Georgia Supreme Court in Mr. Spencer's appellate briefs challenging his conviction and death sentence. In a written opinion, the Georgia Supreme Court rejected those federal

Constitutional claims and affirmed the conviction and death sentence. See Appendix at a1 to a25.

REASONS FOR GRANTING THE WRIT

I.

THE GEORGIA SUPREME COURT IMPROPERLY APPLIED THE EVIDENTIARY RULE OF JUROR INCOMPETENCE TO FORECLOSE PETITIONER'S OPPORTUNITY TO PROVE THAT HIS RACE WAS A FACTOR IN HIS DEATH SENTENCE

The Georgia Supreme Court barred Mr. Spencer from submitting evidence that his race was a factor in the jury's decision to impose the death sentence by invoking the Georgia evidentiary rule forbidding the admission of juror affidavits to impeach their verdict. As a result, Mr. Spencer is under a death sentence that is tainted by racial considerations but he is prevented from proving it.

In McCleskey v. Kemp, 481 U.S. 279 (1987), this Court reaffirmed its "unceasing efforts to eradicate racial discrimination from the criminal justice system." Id at 309-10 & n.30. In that case, a defendant who had been sentenced to death by the Georgia courts challenged his death sentence under the Equal Protection Clause and the Eighth Amendment. Using the results of a statistical study (the "Baldus study"), McCleskey argued that his sentence had been imposed on the basis of his race and the race of his victim. While accepting the premise of his claim that race

should have no role in the sentencing process, this Court refused to find that McCleskey's conviction and sentence of death were unconstitutional because of McCleskey's failure to submit proof that racial considerations were a factor in his case.

This Court first held that the Baldus study was insufficient evidence to support an inference that racial considerations played a part in McCleskey's sentence in violation of the Equal Protection Clause. To prove the "existence of purposeful discrimination" for purposes of an Equal Protection claim, the Court required McCleskey to "prove that the decisionmakers in his case acted with discriminatory purpose." Id. at 292 (emphasis in original). The Court thus rejected McCleskey's claim because he offered "no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." Id. at 292-93.

This Court also refused to find an Eighth Amendment violation, holding that the Baldus study alone did not "demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process." Id. at 313. As with McCleskey's Equal Protection claim, the Court was concerned that purely statistical evidence does not supply sufficient proof that race plays a role in any particular case.

> Even Professor Baldus does not contend that his statistics prove that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case.

Id. at 308 (emphasis in original).

Mr. Spencer submitted to the trial court the evidence specific to his own case that was lacking in McCleskey. He presented a juror affidavit stating that two jurors in the jury room made racially derogatory remarks about Mr. Spencer, including: "A nigger deserves to be dead." Appendix at a30. The affidavit also states the affiant's belief that race was an important factor in certain jurors' decision to convict Mr. Spencer and sentence him to death. Id. at a31. This evidence clearly demonstrates a constitutionally significant risk that racial bias affected the capital sentencing decision in Mr. Spencer's case, in violation of the Eighth Amendment. McCleskey v. Kemp, 481 U.S. at 313. It also "support[s] an inference that racial considerations played a part in [Mr. Spencer's] sentence" necessary to make out an Equal Protection claim. Id. at 292-93.[2] Thus, the affidavit is the very type of evidence which this Court's decision in

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2 In connection with his motion for new trial, Mr. Spencer filed an Omnibus Motion to Obtain Information Concerning the Existence of Racial Bias on the Part of the Jury, the District Attorney's Office or the Court During Trial and Sentencing. R. at 169-78. The trial court denied that motion in its entirety. R. at 672-73.

McCleskey compels a defendant to proffer to establish his constitutional claims that a sentencer's decision was based on racial considerations.

The trial court refused to consider the juror affidavit at all. 9/22/88 Tr. at 128. The Georgia Supreme Court affirmed the trial court's decision on the basis of a Georgia evidentiary rule which provides: "The affidavits of jurors may be taken to sustain but not to impeach their verdict." O.C.G.A. § 17-9-41. Unlike the trial court, however, the Georgia Supreme Court examined the affidavit for the purpose of determining whether the evidentiary rule should be disregarded. The court found the affidavit to be insufficient for this purpose because "it shows only that two of the twelve jurors possessed some racial prejudice and does not establish that racial prejudice caused those two jurors to vote to convict Spencer and sentence him to die." Appendix at a8, 260 Ga. at 644, 398 S.E.2d at 185.

The effect of the Georgia Supreme Court's decision is to bar a defendant from proving with direct evidence that a jury which sentenced him to death did so because of his race. The Georgia Supreme Court's reliance on the verdict impeachment rule amounts to a denial of Mr. Spencer's rights recognized in McCleskey. "[W]here the Supreme Court holds that a particular series of events, when proven, violates a defendant's constitutional rights, implicit in that

determination is the right of the defendant to prove facts substantiating his claim." People v. De Lucia, 20 N.Y.2d 275, 278, 229 N.E.2d 211, 213, 282 N.Y.S.2d 526, 528 (1967); see Green v. Georgia, 442 U.S. 95, 97 (1979); Herbert v. Lando, 441 U.S. 153, 169-70 (1979). While the rule precluding a jury from impeaching its own verdict is based on valid and important policies, it must give way in light of this Court's "unceasing efforts to eradicate racial discrimination" from the criminal justice system. McCleskey v. Kemp, 481 U.S. at 309 & n.30; Batson v. Kentucky, 476 U.S. 79, 85 (1986); Wayte v. United States, 470 U.S. 598, 608 (1985); Vasquez v. Hillery, 474 U.S. 254, 259-62 (1986). The Georgia Supreme Court's refusal to disregard this rule in the face of direct evidence that the decisionmakers in this case sentenced Mr. Spencer to death because he is black eviscerates the constitutional protections and policies this Court reaffirmed in McCleskey.

Perhaps recognizing that its evidentiary ruling would prevent Mr. Spencer from asserting his Constitutional claim, the Georgia Supreme Court sought to justify its decision by noting that the affidavit does not establish that racial prejudice "caused" the jurors to convict Mr. Spencer and sentence him to die. Appendix at a8, 260 Ga. at 644, 398 S.E.2d at 185. In so doing, the Georgia Supreme Court's decision imposes a burden of proof at odds

with the standard applied by this Court in McCleskey. In McCleskey, the Court required the defendant to produce evidence supporting either an inference of racial discrimination or a constitutionally significant risk that race affected the sentencing decision. 481 U.S. at 297, 313. This Court did not require the defendant to conclusively prove that racial prejudice caused his death sentence, as the Georgia Supreme Court demands. Such a burden would be all but impossible to meet in a capital case, where, "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Turner v. Murray, 476 U.S. 28, 35 (1986).

The fact that the Georgia Supreme Court based its decision on the evidentiary rule preventing jurors from impeaching their verdicts does not justify the additional burden. First, in contrast to the Georgia Supreme Court's interpretation, other courts have held that evidence of racial bias is among the exceptions to the rule of juror incompetence. See Dobbs v. Zant, 720 F. Supp. 1566, 1573 (N.D. Ga. 1989) (citing Rushen v. Spain, 464 U.S. 114, 121 n.5 (1983)); Tobias v. Smith, 468 F. Supp. 1287, 1290 (W.D.N.Y. 1979). If this is correct, then the Georgia Supreme Court should have considered the affidavit as

competent evidence under the standards articulated by this Court in McCleskey.

Second, in addition to the statements made during deliberation, the juror's affidavit in this case also establishes the racial bias of a fellow juror based on information acquired outside the jury room. See Appendix at a30 ("I have personally known [the juror] for many years and believe him to be racially prejudiced."). This evidence was admissible to support Mr. Spencer's McCleskey claims, notwithstanding the rule of juror competence. See Dobbs v. Zant, 720 F. Supp. at 1573.

Finally, even if the rule of juror incompetence is applicable, it is error to interpret it in a manner that increases the defendant's initial burden under McCleskey. This Court has held that applying an evidentiary rule to prevent a capital defendant from asserting his Eighth Amendment rights is a denial of due process. Green v. Georgia, 442 U.S. 95, 97 (1979) ("Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment."). The Georgia Supreme Court recognized here, as it has previously, this due process limitation on the rule of juror incompetence. Appendix at a7, 260 Ga. at 643-44, 398 S.E.2d at 184; Williams v. State, 252 Ga. 7, 310 S.E.2d

528 (1984); see also Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987). Thus, applying the rule in a manner that increases a capital defendant's burden under McCleskey would be a denial of due process.

Under the standards of McCleskey, the juror affidavit in this case was sufficient evidence to establish prima facie violations of both the Equal Protection Clause and the Eighth Amendment, particularly when viewed in light of the other evidence of racial considerations. First, of course, Mr. Spencer is in the category of defendants determined by the Baldus study to be the most likely to receive the death penalty in Georgia -- he is black, his victim was white. See McCleskey v. Kemp, 481 U.S. at 286-87. Second, the Georgia courts simply ignored the additional evidence that racial discrimination affected Mr. Spencer's case, including: (1) the prosecutor's use of his peremptory challenges to remove only blacks from the jury; (2) the trial court's restriction of defense counsel's questioning of veniremen as to the existence of racial bias; and (3) the recent history of racial discrimination in Burke County, Lodge v. Buxton, 639 F.2d 1358, 1381 (5th Cir. Unit B Mar. 1981), aff'd sub nom. Rogers v. Lodge, 458 U.S. 613 (1982).

The Court should grant certiorari to decide whether Georgia can apply its rule against impeachment of a verdict

to bar valid claims under the Eighth Amendment and the Equal Protection Clause. The Court should also decide whether, even if the rule is valid, its application in this case imposes a impermissibly high standard of proof on a capital defendant who seeks to prove that race was a constitutionally forbidden factor in his death sentence.

II.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG LOWER COURTS AS TO WHAT CONSTITUTES A PRIMA FACIE CASE OF RACIAL DISCRIMINATION UNDER BATSON V. KENTUCKY

During voir dire, the State used a total of nine peremptory challenges and struck only blacks from the jury venire. R. at 722. That pattern of strikes, examined in light of Mr. Spencer's race, the race of his victim, and the improper impact that race has had on prior proceedings in this case and in Burke County, raised an interference of purposeful discrimination in violation of Batson v. Kentucky, 476 U.S. 79 (1986). The trial court, without even requiring the district attorney to come forward with a neutral explanation for his use of those peremptory challenges, rejected Mr. Spencer's challenge under Batson.[3] The Georgia Supreme Court affirmed.

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3 In connection with his motion for new trial, Mr. Spencer filed a Motion to Compel The District Attorney to Produce A Record Of Its Use of Peremptory Strikes To Remove Jurors
FOOTNOTE 3 CONTINUED ON NEXT PAGE

In Batson, this Court recognized that purposeful exclusion of members of a defendant's race from the jury selected to try him is a violation of the Fourteenth Amendment. The Court held that a defendant could make out a prima facie Equal Protection Clause violation by showing that the prosecutor had exercised peremptory challenges to remove prospective jurors of the defendant's race which, under the circumstances of the defendant's case, raised an inference that the jurors were excluded on account of their race. 476 U.S. at 96. As one example, the Court stated that an inference of discrimination might arise upon a defendant's showing of "a 'pattern' of strikes against black jurors included in the particular venire." Id. at 97.

In this case, the trial court relied on the ultimate racial composition of the jury -- six black, six white -- rather than examining the selection process to conclude that there had been no Batson violation. See 9/22/88 Tr. at 84. In affirming the decision on appeal, the Georgia Supreme Court, like the trial court, noted that "the trial jury was evenly split racially." Appendix at a5 n.2,

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FOOTNOTE 3 CONTINUED FROM PREVIOUS PAGE
From Jury Panels And All Notes From Jury Voir Dire In All Cases Where The Death Penalty Was Or Could Have Been Sought. R. at 151-54. The trial court denied that motion in its entirety. R. at 664-65. Cf. Wise v. State, 179 Ga. App. 115, 346 S.E.2d 393 (1986) (case remanded to trial court to require same District Attorney who tried Mr. Spencer to explain action in striking all black jurors).

260 Ga. at 643 n.2, 398 S.E.2d at 184 n.2. As an alternative ground for its decision, the Georgia Supreme Court held for the first time that Mr. Spencer's Batson claim was not preserved for review, even though it had been addressed on the merits by the trial court. Appendix at a5, 260 Ga. at 643, 398 S.E.2d at 184.

A. The Ultimate Racial Composition of the Jury Does Not Preclude a Prima Facie Case under Batson v. Kentucky

The Georgia Supreme Court has consistently rejected prima facie proof of a Batson claim by focusing exclusively on the racial composition of the jury that was ultimately selected, despite a clear pattern of peremptory challenges by the prosecutor against blacks. Out of numerous cases in which the Georgia Supreme Court has been required to decide whether the defendant had presented a sufficient prima facie case, the court found the defendant's showing to be sufficient in only a single instance -- where the prosecutor used ten peremptory challenges to strike ten black jurors in the venire, leaving an all white jury. Gamble v. State, 257 Ga. 325, 357 S.E.2d 792 (1987). In the remaining cases, the court refused to find a prima facie case based solely on the presence of blacks on the jury. Spencer v. State, Appendix at a5 n.2, 260 Ga. at 643 n.2, 398 S.E.2d at 184 n.2 (six blacks served on jury); Moody v. State, 258 Ga. 818, 375 S.E.2d 30 (1989) (no prima facie case where

prosecutor used five peremptory challenges against blacks but four blacks served on jury); Williams v. State, 258 Ga. 281, 368 S.E.2d 742 (1988) (no prima facie case where prosecutor used six regular and one alternate peremptory challenge against blacks but four blacks served on jury), cert. denied, 109 S. Ct. 3261 (1989); Aldridge v. State, 258 Ga. 75, 365 S.E.2d 111 (1988) (no prima facie case where prosecutor used seven regular and both alternate peremptory challenges against blacks but three blacks served on jury); Williams v. State, 257 Ga. 788, 364 S.E.2d 569 (1988) (no prima facie case where jury was composed of seven blacks, five whites and two black alternates); Mincey v. State, 257 Ga. 500, 504, 360 S.E.2d 578, 582 (1987) (no prima facie case where prosecutor used seven of ten peremptory challenges against blacks but three blacks served on jury).

The Georgia Supreme Court's focus on the result rather than the process of selection permits a prosecutor to discriminate with impunity so long as he leaves some number of blacks on the jury. That is contrary to this Court's decision in Batson, which focused on discrimination in the selection of jurors as the basis for an Equal Protection claim, not whether the resulting jury includes blacks or whites.

> In holding that racial discrimination in jury selection offends the Equal Protection Clause, the Court in Strauder recognized, . . . that a defendant has no right to a "petit jury composed in whole or

> part of persons of his own race." . . . But the defendant does have the right to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria.
>
> . . . Those on the venire must be "indifferently chosen," to secure the defendant's right under the Fourteenth Amendment to "protection of life and liberty against race or color prejudice."

476 U.S. at 85-87 (citations and footnotes omitted).

The Georgia Supreme Court's emasculation of Batson conflicts with application of this Court's Batson decision in other jurisdictions. It is well-recognized by other courts that the presence of blacks on the jury ultimately selected does not preclude a prima facie case under Batson. United States v. Clemons, 843 F.2d 741, 748 (3d Cir.), cert. denied, 488 U.S. 835 (1988); United States v. Johnson, 873 F.2d 1137, 1139 (8th Cir. 1989); United States v. Romero-Reyna, 867 F.2d 834, 837 (5th Cir. 1989), cert. denied, 110 S. Ct. 1818 (1990); United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987); State v. Collier, 553 So. 2d 815, 819 (La. 1989).

In other jurisdictions, the prosecutor's pattern of strikes in Mr. Spencer's case, standing alone, would have established a prima facie case of discrimination. See United States v. Alvarado, 923 F.2d 253 (2d Cir. 1991); Tolbert v. State, 315 Md. 13, 553 A.2d 228, 230 (1989); State v. Slappy, 522 So. 2d 18 (Fla.) (use of four of six peremptories to strike blacks established prima facie case),

cert. denied, 487 U.S. 1219 (1988); State v. Belnavis, 246 Kan. 309, 787 P.2d 1172 (1990) (prosecutor's use of peremptory challenges against two black prospective jurors, without more, was sufficient to establish a prima facie case).

This Court should grant certiorari in this case to resolve the conflict among the courts as to what constitutes a prima facie case of discrimination and to ensure that a defendant tried in the Georgia courts enjoys no lesser protection under Batson than defendants tried in other jurisdictions.

B. The Georgia Court's Finding of Procedural Default Does Not Bar This Court's Review of Petitioner's Batson Claim.

The Georgia Supreme Court's finding of procedural default in this case is not an adequate and independent state ground barring this Court's review of Mr. Spencer's Batson claim. In Ford v. Georgia, 59 U.S.L.W. 4111, 4115 (Feb. 19, 1991) (No. 87-6796), this Court unanimously rejected the Georgia Supreme Court's attempt to apply a state procedural bar to a Batson claim, holding that the rule applied was not "firmly established and regularly followed" and therefore was not an adequate and independent state rule under James v. Kentucky, 466 U.S. 341 (1984). This case, like Ford, presents another arbitrary and

inadequate procedural bar erected by the Georgia Supreme Court to preclude review of a legitimate Batson claim.

In the trial court, the possibility of a Batson claim was raised and discussed by defense counsel and the trial court after the jurors were chosen but prior to the time the jurors were sworn. See State v. Sparks, 257 Ga. 97, 98, 355 S.E.2d 658, 659 (1987). The trial court, however, headed off any attempt by defense counsel to raise a Batson claim by stating "I saw no evidence of that." Tr. at 617. Defense counsel then asked for an opportunity to "reserve that objection" so that he could consider the Batson claim further, and the trial court agreed. Id. at 618. The District Attorney did not question the trial court's decision at that time.

Mr. Spencer renewed his Batson claim in his motion for new trial. At that time, Mr. Spencer submitted and relied upon the proof the Georgia Supreme Court requires to assert such a claim. See R. at 272, 437-40; see also Aldridge v. State, 258 Ga. 75, 365 S.E.2d 111 (1988). At the September 1988 hearing on Mr. Spencer's motion for new trial, the State did not argue that the Batson claim had been waived. Following that hearing, the trial court considered and rejected Mr. Spencer's Batson claim on the merits. Appendix at a27 to a28.

On appeal, the Georgia Supreme Court ignored the trial court's decision. Instead, the Georgia Supreme Court seized upon the colloquy at the end of jury selection as a basis for finding that the objection was procedurally barred.

> [T]he trial court did not explicitly allow counsel to reserve his objection; the court only noted there was no objection "at this time." Even if the court's response were liberally construed to implicitly grant the defendant some additional time to "make [a] record," we do not think the court's response can be interpreted reasonably to allow the defendant to wait until his fourth amended motion for new trial to raise a Batson issue.

Appendix at a5, 260 Ga. at 642, 398 S.E.2d at 183.

The Georgia Supreme Court's reconstruction of the record is, of course, directly contrary to what the trial court actually did. During the Unified Appeal Procedure hearing following the striking of the jury, the trial court permitted defense counsel to reserve his right to raise a Batson objection until sometime later in the proceedings. The Batson claim was expressly asserted by Mr. Spencer in his motion for new trial, and at the hearing on that motion the State offered no evidence and submitted no papers in opposition. After allowing the parties an additional week to submit further evidence or arguments, the trial court issued an order denying Mr. Spencer's motion in its entirety, stating: "The Court has further examined all of the other grounds set forth in the defendant's motion and it

finds them individually and collectively to be without merit." Appendix at a28.

The Georgia Supreme Court's decision is contrary to the "firmly established and regularly followed state practice" applied by Georgia in capital cases. See James v. Kentucky 466 U.S. 341, 348-51 (1984). The Unified Appeal Procedure used by the Georgia courts in death penalty cases requires that any doubt be resolved in a manner that avoids waiver where the waiver is not clear from the record. Uniform Superior Court Rule 34.2(B)(2) provides:

> In the event defense counsel intends to allow a deadline to pass without first presenting an issue for decision, the court shall question defense counsel in the presence of the defendant to determine whether or not defense counsel has explained to the defendant his rights regarding that issue and whether defense counsel and the defendant have agreed not to assert the issue. There questions put to defense counsel by the court and the responses of defense counsel shall be taken down and transcribed by the official court reporter to the end that it will be established that the right of the defendant is being waived knowingly, voluntarily and intelligently after due consideration by the defendant and defense counsel.

Ga. Super. Ct. R. 34.2(B)(2). At the motion for new trial stage, the trial court is further obligated to ensure that the record or transcript of proceedings reflects a knowing, voluntary and intelligent waiver by the defendant if the defendant allowed a deadline for issue presentation to pass

without presenting the issue. Ga. Super. Ct. R. at 34.5(A)(11).

Here, the trial court did not question defense counsel to establish that Mr. Spencer knowingly, voluntarily and intelligently waived his Batson claim. Instead, the trial court permitted defense counsel to reserve his Batson objection and, when that claim was asserted later, denied it on the merits. The Georgia Supreme Court's finding of waiver on that record is contrary to the procedural rules in the Uniform Appeals Procedure as well as the duty the Georgia Supreme Court has assigned itself under those rules. See Newland v. State, 258 Ga. 172, 174, 366 S.E.2d 689, 692 (under Unified Appeal Procedure, Supreme Court has affirmative duty to consider assertions of error raised in trial courts), cert. denied, 488 U.S. 975 (1988). Thus, the finding of waiver in this case is not based on "firmly established and regularly followed state practice" and therefore is not an independent and adequate state procedural rule barring federal review of Mr. Spencer's Batson claim. Ford v. Georgia, 59 U.S.L.W. at 4114-15.

III.

THE MANDATE OF BECK V. ALABAMA CANNOT BE AVOIDED BY REINTERPRETING THE VOLUNTARY MANSLAUGHTER STATUTE.

Under Georgia law, the crime of voluntary manslaughter is a lesser-included offense of murder. Washington v. State, 249 Ga. 728, 730, 292 S.E.2d 836, 838 (1982). During his trial, Mr. Spencer unsuccessfully requested the trial court to charge the jury on voluntary manslaughter. Tr. at 889-90, 896. The trial court's refusal to charge this lesser-included offense violated Mr. Spencer's rights under the Eighth and Fourteenth Amendments. Beck v. Alabama, 447 U.S. 625 (1980). When Mr. Spencer raised this issue on appeal, the Georgia Supreme Court cited to the facts which supported the voluntary manslaughter charge, Spencer v. State, Appendix at a5 to a6, 260 Ga. at 643, 398 S.E.2d at 184, but sua sponte reinterpreted its voluntary manslaughter statute to bar its application in this case as a matter of law. The result is to render Beck v. Alabama meaningless by refusing to recognize the existence of a lesser-included offense as a purported matter of state law. Thus, this case presents the same issue currently under consideration by this Court in Schad v. Arizona, 111 S. Ct. 243 (1990) (order granting certiorari).

In Beck this Court held that a defendant in a capital case is entitled to a jury instruction on a lesser-included offense when the evidence warrants such a charge. Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Hopper v. Evans, 456 U.S. 605 (1982).

> [W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake.

Beck v. Alabama, 447 U.S. at 637.

Mr. Spencer was charged with the capital offense of malice murder,[4] and therefore was entitled to an instruction on the lesser-included offense of voluntary manslaughter if it was supported by any evidence in the record.[5] Under Georgia law, "[w]hen a homicide is neither justifiable nor malicious, it is manslaughter, and if intentional, it is

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4 "A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." O.C.G.A. § 16-5-1(a).

5 "A person commits the offense of voluntary manslaughter when he causes the death of another human being under circumstances which would otherwise be murder and if he acts solely as a result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person . . . ." O.C.G.A. § 16-5-2(a).

voluntary manslaughter." Starr v. State, 134 Ga. App. 149, 149, 213 S.E.2d 531, 532 (1975).

> Evidence of voluntary manslaughter may be found in "a situation which arouses sudden passion in the person killing so that, rather than defending himself, he willfully kills the attacker, albeit without malice aforethought, when it was not necessary for him to do so in order to protect himself." Williams v. State, 232 Ga. 203, 204 (206 S.E.2d 37) (1974).

Washington v. State, 249 Ga. 728, 730, 292 S.E.2d 836, 838 (1982).

One of the essential elements the evidence must show is provocation sufficient to create "a sudden, violent and irresistible passion." See O.C.G.A. § 16-5-2. Provocation can be conduct, or words and conduct together, that creates fear of immediate danger in a reasonable man. Washington v. State, 249 Ga. at 730, 292 S.E.2d at 838; Moore v. State, 228 Ga. 662, 663, 187 S.E.2d 277, 278 (1972). The fear engendered by danger is sufficient provocation to excite the passion necessary for voluntary manslaughter. Thomas v. State, 184 Ga. App. 131, 132, 361 S.E.2d 21, 23 (1987); Tew v. State, 179 Ga. App. 369, 346 S.E.2d 833 (1986). "While a belief that the victim was about to reach for a weapon may not result in a finding of justification [self-defense], the fear of some danger can be sufficient provocation to excite passion." Washington v.

State, 249 Ga. at 730, 292 S.E.2d at 838; Thomas v. State, 184 Ga. App. at 132, 361 S.E.2d at 23.

In Georgia a voluntary manslaughter charge must be given if there is any evidence, however slight, as to whether the offense is murder or voluntary manslaughter. Coleman v. State, 256 Ga. 306, 307, 348 S.E.2d 632, 633 (1986).[6] This rule is consistent with the rationale stated by this Court in Beck for capital cases:

> "A judge may be entirely satisfied from the whole evidence in the case, that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter."

447 U.S. at 635 n.11 (quoting Stevenson v. United States, 162 U.S. 313, 323 (1896)).

In this case, the requested instruction was clearly warranted under existing Georgia law. The evidence introduced at trial showed that Mr. Spencer shot

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6 The Georgia Supreme Court has recently recommended that the Georgia trial courts charge voluntary manslaughter in every case where requested by the defendant because "[s]uch a charge, on request, cannot be reversible error, and if routinely given, would vastly reduce the expense and delay involved on appeal of the sometimes difficult questions of whether there is sufficient evidence to support such a charge as a matter of law." Gooch v. State, 259 Ga. 301, 303 n.2, 379 S.E.2d 522, 524 n.2 (1989).

Mr. Williams in the head and killed him. Tr. at 712-13, 811, 847, 849, 850, 862. Mr. Spencer's trial counsel did not dispute those facts and conceded to the jury that Mr. Spencer killed Mr. Williams. Tr. at 910.

The evidence further showed that Mr. Spencer did not act maliciously in shooting Mr. Williams. Mr. Spencer did not deny that he pointed the gun at Mr. Williams, that he intentionally pulled the trigger or that he intentionally fired the shot that killed him. Tr. at 862; see Tr. at 850. Mr. Spencer also testified that, when he pulled the trigger of the gun, he knew that Mr. Williams would be hurt. Tr. at 850. Mr. Spencer stated, however, that he never wanted or planned to kill anyone and specifically denied that he acted with any malice. Tr. at 848-49, 850, 863; see Tr. at 843 (only wanted gun to facilitate escape). The lack of malicious intent is further demonstrated by Mr. Spencer's warning to Mr. Williams to "get away," Tr. at 847, and by the fact that Mr. Spencer had the opportunity to shoot a number of people who came up to the car, but did not. Tr. at 688, 708-09, 881.

The evidence also supported a finding that Mr. Spencer acted because of a "sudden passion" resulting from "serious provocation." Mr. Spencer testified that he shot Mr. Williams in panic when Mr. Williams lunged for Mr. Beazley's loaded .357 Magnum pistol on the front

dashboard of the vehicle. Tr. at 847, 850-51. See also Tr. at 850 ("Q. You knew what you were doing when you did it? A. No sir, I can't say that I knew what I was doing, no sir."). Mr. Spencer was locked in a cage in the back of Mr. Beazley's vehicle, Tr. at 846, and he testified that he believed that, if he had not shot Mr. Williams, he would have been killed, Tr. at 846-47, 881. Washington v. State, 249 Ga. at 730, 292 S.E.2d at 838; Tew v. State, 179 Ga. App. 369, 346 S.E.2d 833 (1986); Syms v. State, 175 Ga. App. 179, 180, 332 S.E.2d 689, 690 (1985).

Mr. Spencer's version of events was corroborated by other witnesses. One of the State's witnesses, Charlie Padgett, testified that, as he ran up to the car holding Mr. Spencer, the car was rocking back and forth, showing that Mr. Spencer was in an extremely excited state. Tr. at 711. That description was confirmed by another State witness, Trooper Charles Parker, who testified that, when he came upon the scene, Mr. Spencer was in the rear of the vehicle "moving about in a very rapid manner." Tr. at 724. Trooper Parker also confirmed that when he stopped Mr. Spencer immediately after the shooting, he was very nervous and excited. Tr. at 733.

Mr. Padgett also testified that Mr. Spencer only shot Mr. Williams when Mr. Williams stuck his head into the front right door of the vehicle. Tr. at 712-13, 716-17.

Other testimony established that Mr. Beazley's .357 Magnum was on the front dashboard, that it was loaded and that Mr. Williams' actions reaching into the vehicle were consistent with trying to reach for that gun. Tr. at 732, 747-48, 812-15, 826-27. The State's pathologist testified that the shot that killed Mr. Williams struck him just behind the right ear and that the location of the wound was consistent with Mr. Spencer shooting Mr. Williams as he reached into the right front door of the car to get the gun on the dashboard. Tr. at 811-15; see Tew v. State, 179 Ga. App. at 372, 346 S.E.2d at 836 (defendant testifies that victim reached into car to grab him and defendant shot; court held evidence supported voluntary manslaughter conviction).

On appeal, the Georgia Supreme Court did not dispute the description of the crime testified to by Mr. Spencer or the evidence of provocation, conceding that there was evidence in the record showing that Mr. Spencer acted out of fear and panic. Appendix at a2, 260 Ga. at 641, 398 S.E.2d at 182. Thus, under its prior cases the Georgia Supreme Court was faced with a record under which the voluntary manslaughter charge should have been given, see Coleman v. State, 256 Ga. 306, 307, 348 S.E.2d 632, 633 (1986), and the failure to have done so violated Beck. Nonetheless, the Georgia Supreme Court relied on its

decision in Horton v. State, 249 Ga. 871, 295 S.E.2d 281 (1982), cert. denied, 459 U.S. 1188 (1983), to craft sua sponte a new limit on voluntary manslaughter so that such a charge was unavailable in this case as a matter of law.

In Horton, the defendant was convicted of murder, which occurred during the course of a burglary. On appeal, the defendant argued that the trial court erred in refusing to charge voluntary manslaughter. In denying this claim, the Georgia Supreme Court held: "Being discovered during the commission of a burglary is not as a matter of law such provocation as would require a charge on voluntary manslaughter." 249 Ga. at 872, 295 S.E.2d at 284.

In this case, the Georgia Supreme Court expanded the rule of Horton by holding that provocation could not exist as a matter of law because the shooting of Lett Williams occurred in the course of an escape attempt. Having ruled that there was no legal provocation, the Georgia Supreme Court could then circumvent this Court's decision in Beck by simply concluding that "the evidence fails to warrant such a charge." Appendix at a6, 260 Ga. at 643, 398 S.E.2d at 184; cf. Gooch v. State, 259 Ga. 301, 379 S.E.2d 522 (1989) (voluntary manslaughter charge should be given in every case it is requested). By so reinterpreting Georgia's voluntary manslaughter statute, the

Georgia Supreme Court was able to justify the trial court's refusal to give the lesser-included charge even though warranted by the actual evidence developed at trial and the law at that time. Such an unprecedented rule is contrary to the "nearly universal acceptance of the rule [requiring a lesser-included offense instruction] in both state and federal courts." Beck v. Alabama, 447 U.S. at 635-37 & nn.10-12 Given that Mr. Spencer was facing the death penalty, "[t]hat safeguard would seem to be especially important in a case such as this." Id. at 637.

This Court recently granted a petition for certiorari in Schad v. Arizona, 111 S. Ct. 243 (1990) (order granting certiorari), to decide whether a state court can avoid the effect of Beck by failing to recognize the existence of any lesser-included offense under state law. The Georgia Supreme Court's decision in this case represents an even further departure from Beck. The state courts must not be permitted to redefine substantive criminal law on a case-by-case basis for the purpose of eroding the Constitutional protections afforded to a capital defendant. The Court should grant certiorari in this case to halt this evisceration of Beck.

IV.

THE GEORGIA SUPREME COURT'S DECISION AFFIRMING THE TRIAL COURT'S EXCLUSION OF RELEVANT MITIGATING EVIDENCE IS INCONSISTENT WITH THIS COURT'S DECISION IN SKIPPER V. SOUTH CAROLINA

The Georgia Supreme Court upheld the trial court's refusal to grant a two hour continuance to await the arrival of Mr. Spencer's main mitigation witness, who was traveling cross-country to testify on his behalf. The decision effectively precluded the jury from considering relevant mitigating evidence as required by this Court's decision in Skipper v. South Carolina, 476 U.S. 1 (1986). Moreover, the denial of a continuance permitted the jury to impose the death sentence on the basis of evidence and arguments Mr. Spencer had no opportunity to deny or explain, in violation of the "constitutional command that no person shall be deprived of life without due process of law." Gardner v. Florida, 430 U.S. 349, 351 (1977).

A. The Denial of A Continuance That Effectively Deprives A Capital Defendant of An Opportunity To Present Relevant Mitigating Evidence Violates The Eighth Amendment.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978), this Court held that the sentencer in a capital case may not be precluded from considering any relevant mitigating evidence that the defendant proffers as a basis for a sentence less than

death. Following Lockett and Eddings, the Court has repeatedly vacated death sentences where it is not clear that the sentencer gave adequate consideration to such evidence or where the sentencer was precluded from considering the mitigating evidence at all. Clemons v. Mississippi, 110 S. Ct. 1441, 1450 (1990) (vacating death sentence because "we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence"); McKoy v. North Carolina, 110 S. Ct. 1227 (1990) (vacating death sentence where North Carolina's unanimity requirement prevented the jury from considering any mitigating factor not unanimously found); Penry v. Lynaugh, 492 U.S. 302 (1989); Mills v. Maryland, 486 U.S. 367 (1988) (reversing death sentence where jurors possibly thought that they were precluded from considering mitigating evidence); Sumner v. Shuman, 483 U.S. 66 (1987) (reversing death sentence for statutory preclusion of consideration of mitigating evidence); Hitchcock v. Dugger, 481 U.S. 393 (1987) (unanimously reversing death sentence for refusal to consider evidence of nonstatutory mitigating circumstances).

In Skipper v. South Carolina, 476 U.S. 1 (1986), the Court reversed the petitioner's death sentence because the jury was not permitted to consider evidence of the petitioner's post-arrest behavior in jail. The Court held

that the trial court's exclusion of this evidence violated the Eighth Amendment because it "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Id. at 8-9.

In this case, Mr. Spencer sought to present the testimony of Leah Kirtland, a woman who was in a unique position to testify to the many positive changes Mr. Spencer had undergone during his years in prison. Along with her family, Ms. Kirtland had been corresponding with Mr. Spencer on an average of twice a week for nine years preceding the trial. Appendix at a32. Ms. Kirtland had also spoken on the telephone with Mr. Spencer every few months and had traveled from her home in Oregon to visit him in prison on several occasions. Id. at a32, a34. Ms. Kirtland would have testified to the positive changes in Mr. Spencer's personality and attitudes over the nine-year period she had known him. Id. at a36. As in Skipper, the evidence in this case would have permitted the jury to draw favorable inferences regarding Mr. Spencer's character and probable future conduct. See McKoy v. North Carolina, 110 S. Ct. at 1232 (state cannot bar the consideration of mitigating evidence if the sentencer could reasonably find that it warrants a sentence less than death).

The trial court refused to grant a brief continuance to await Ms. Kirtland's scheduled arrival, Tr. at 973-80, even though trial counsel showed that she would arrive within a few hours. Ms. Kirtland in fact arrived during defense counsel's closing argument. Id. at 871. The trial judge was informed of her presence, Tr. at 1026, but failed to reopen the record to allow her to testify.[7] On appeal, the Georgia Supreme Court held that the trial court did not abuse its discretion by refusing to grant the requested continuance. Appendix at a21 to a22, 260 Ga. at 652, 398 S.E.2d at 190.

Precluding Ms. Kirtland from testifying -- by whatever means -- deprived Mr. Spencer of his Eighth Amendment right to present evidence that suggested some basis for a sentence other than death. The Constitution

> requires States to allow consideration of mitigating evidence in capital cases. Any barrier to such consideration must therefore fall.

McKoy v. North Carolina, 110 S. Ct. at 1233 (emphasis in original). The fact that the barrier here was the trial

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7 The effect of the trial court's error was compounded because the jury had learned that Ms. Kirtland was expected to testify, Tr. at 947, but was given no explanation of her failure to appear, and she was not identified to them when she did appear. Certainly there is a possibility that the jury drew a negative inference from Ms. Kirtland's failure to appear, possibly imagining that Ms. Kirtland had herself decided against attending because she was unwilling to appear on Mr. Spencer's behalf.

court's denial of a two-hour continuance, rather than an evidentiary ruling as in Skipper, does not change the result. Mr. Spencer's jury was precluded from considering relevant mitigating evidence, and this violated the Eighth Amendment.

B. The Denial of A Continuance That Prevents A Capital Defendant From Denying or Explaining The Evidence Against Him Is A Denial Of Due Process.

The prosecutor argued that Mr. Spencer should be sentenced to death because he posed a future escape risk, based on the fact that he had tried to escape in 1974. As in the case of the witnesses excluded in Skipper, Ms. Kirtland's testimony regarding the change in Mr. Spencer's personality and attitudes would have rebutted the prosecution's arguments on this point. Thus, exclusion of Ms. Kirtland's testimony also violated the "elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he has no opportunity to deny or explain.'" Skipper, 476 U.S. at 5 n.1 (quoting Gardner v. Florida, 430 U.S. 349, 362 (1977)).

This Court has recognized that the refusal to grant a continuance is a denial of due process if the refusal deprives the defendant of a right guaranteed by the Constitution. Chandler v. Fretag, 348 U.S. 3 (1954); see also Ungar v. Sarafite, 376 U.S. 575, 589 (1964) (while the

matter of a continuance is traditionally within the discretion of the trial judge, "a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality").

The federal courts have not hesitated to grant federal habeas relief when a state court's denial of a reasonable continuance prevented a defendant from presenting witnesses on his behalf. Bennett v. Scroggy, 793 F.2d 772 (6th Cir. 1986) (granting federal habeas relief where state court denied overnight continuance to enable defendant to procure presence of witness who would testify to victim's reputation for violence, thus supporting defendant's theory of self-defense); Dickerson v. Alabama, 667 F.2d 1364 (11th Cir. 1982) (granting federal habeas relief where state court denied motion for continuance to locate alibi witness whose testimony, while similar to that of other witnesses, was not cumulative because it would have "lent a new aura of credibility" to the alibi defense), cert. denied, 459 U.S. 878 (1983); Hicks v. Wainwright, 633 F.2d 1146 (5th Cir. Unit B Jan. 1981) (granting federal habeas relief where state court refused continuance of six hours to await arrival of expert witness who would have established insanity defense).

This Court has "repeatedly recognized the defendant's compelling interest in fair adjudication at the sentencing phase of a capital case." Ake v. Oklahoma, 470 U.S. 68, 83 (1985). In Ake, the Court held that due process required the state to bear the cost of providing a defendant with the assistance of a psychiatrist for the purpose of rebutting the state's evidence of future dangerousness at a capital sentencing hearing. Id. at 84. Similarly, in Gardner v. Florida, 430 U.S. at 362, this Court vacated the defendant's death sentence on due process grounds because he had no opportunity to rebut the information in a presentence report considered by the judge who sentenced him to death.

Mr. Spencer's interest in a fair adjudication was as compelling as that of the defendants in Ake and Gardner. There was no countervailing interest substantial enough to warrant denial of the requested continuance.[8] At the time defense counsel requested the continuance, he reported to the trial court that he believed Ms. Kirtland was on her flight to Georgia, which was scheduled to arrive in a few

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8 The special nature of the bifurcated capital trial has led one commentator to suggest that the courts should routinely grant thirty day continuances between the trial and penalty phases in order to ensure an adequate opportunity to prepare for the penalty phase. Abrams, A Capital Defendant's Right to A Continuance Between The Two Phases of A Death Penalty Trial, 64 N.Y.U. L. Rev. 579 (1989).

hours. Tr. at 947-52. This belief was based on a telephone call from Ms. Kirtland that morning, when she told defense counsel's office that she planned to take her scheduled flight. Tr. at 983-84.

In contrast to the profound effect on Mr. Spencer's ability to argue against a death sentence, the requested continuance would have imposed only a minimal burden on the state and the trial court. It is apparent from the record that the chief consideration in the trial court's decision was the pressure he felt from the law enforcement officials,[9] spectators[10] and the press[11] to dispose of a case that had been "hanging [around] for too many years." Tr. at 973-74. Pressure of this sort is not a valid basis for denying a reasonable continuance in a capital case.

This Court should grant certiorari to decide whether the denial of a few hours' continuance to permit a scheduled witness to arrive and testify at the sentencing phase denies a capital defendant his rights under the Eighth and Fourteenth Amendments.

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9 See Tr. at 978-79 (colloquy in which sheriff asks trial court whether to hold motel rooms for jurors that evening, stating he "can kind of guess" how long the deliberations will take once the case goes to the jury).

10 See Tr. at 973 (trial court noting, "We've got these people that are interested in this case that have come from all over everywhere.").

11 See Tr. at 993 (prosecutor's closing argument notes presence of television cameras and news reporters).

CONCLUSION

The petition for a writ of certiorari to review the judgment of the Georgia Supreme Court should be granted.

Dated: March 18, 1991

Respectfully submitted,

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In the Supreme Court of Georgia

Decided: NOV 21 1990

S90P0921. SPENCER v. THE STATE.

BENHAM, Justice.

This is a case in which a death sentence has been imposed. The defendant, James Lee Spencer, originally was convicted and sentenced to death in 1975. The judgment was affirmed. Spencer v. State, 236 Ga. 697 (224 SE2d 910) (1976). However, Spencer obtained federal habeas corpus relief in connection with his challenges to the composition of his grand and traverse juries. See Spencer v. Kemp, 781 F2d 1458 (11th Cir. 1986). He has now been retried, convicted of malice murder, aggravated assault and escape, and sentenced to death.[1]

The crimes occurred on October 31, 1974, while Spencer was being transported in a police-type automobile from Richmond County to the Georgia state prison in Reidsville. The transporting officer's father-in-law rode with them. As they

[1] Spencer was re-indicted on April 29, 1987. He was sentenced to death for murder on September 3, 1987. A motion for new trial was filed on September 27, 1987, and amended several times thereafter. The motion for new trial was denied on October 4, 1988. A motion to reconsider was denied October 19, 1988. The case was argued orally on February 13, 1989. On May 25, 1989, this court remanded the case to the superior court for further proceedings. These proceedings were heard on January 16, 1990, and the trial court issued its ruling on March 28, 1990. The case was redocketed in this court on April 11, 1990, and the case was re-argued on June 25, 1990.

neared Millen, Georgia, a message came over the police radio that Spencer might be armed. He was. He also had a key to his handcuffs. Spencer, who was in the back-seat area of the car, shot the driver five times before he could stop the car, and he and his father-in-law got out. The driver, seriously wounded, lay on the ground outside the car. Spencer tried to kick his way out of the car. (The inside handles had been removed from the rear-seat area of the car.) When the father-in-law reached in to the front-seat area of the car, Spencer shot him in the head, killing him instantly. Finally, Spencer managed to kick out one of the back windows, and exited the car. A state patrolman arrived and apprehended Spencer almost immediately.

Spencer testified at the guilt phase of the retrial. He admitted shooting the transporting officer and the father-in-law. He claimed he did so because he was frightened by the radio message and shot in panic.

The evidence supports the conviction. Jackson v. Virginia, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

1. (a) In his sixth enumeration of error, the defendant complains of the court's refusal to excuse nine jurors allegedly biased against the defendant.

Four of these nine prospective jurors were not challenged for cause by the defense (Josey, Allen, Broxton and Mulling). The trial court did not err by failing to excuse sua sponte these unchallenged jurors. Childs v. State, 257 Ga. 243, 249 (7) (357 SE2d 48) (1987). We do not find erroneous the trial court's

finding that the remaining five were qualified to serve as jurors. Isaacs v. State, 259 Ga. 717, 730 (21) (386 SE2d 316) (1989).

(b) In his seventh enumeration of error, the defendant contends a prospective juror should have been excused for cause for her attitude about the death penalty. However, she was not challenged at trial and, as above, the trial court did not err by not excusing the juror sua sponte. Childs v. State, supra.

(c) In his eighth and eleventh enumerations, Spencer contends the court erred by excluding for cause five prospective jurors who were conscientiously opposed to the death penalty. We need not consider the court's excusals of two of these prospective jurors (Williams and Lynch), as Spencer did not object at trial to these excusals. See Blankenship v. State, 258 Ga. 43 (2) (365 SE2d 265) (1988). The court's excusals of the other three were within the deference due the trial court's determination under Wainwright v. Witt, 469 U. S. (105 SC 844, 83 LE2d 841) (1985). Jefferson v. State, 256 Ga. 821 (2) (353 SE2d 468) (1987). See also Isaacs v. State, supra (23).

(d) The "scope of the voir dire examination must, of necessity, be left to the sound discretion of the trial judge." Curry v. State, 255 Ga. 215, 218 (2 b) (336 SE2d 762) (1985). We do not find an abuse of discretion in this case, and find no merit to Spencer's claim that the voir dire examination was too restricted (enumeration 12) or that the trial court applied a "double standard" to challenges for cause (enumeration 8).

(e) In his tenth enumeration, Spencer contends the state exercised its peremptory challenges in a racially discriminatory manner. See Batson v. Kentucky, 476 U. S. 79 (106 SC 1712, 90 LE2d 69) (1986). The state answers that Spencer has failed to preserve this issue for review on appeal. Spencer disagrees, claiming the trial court allowed him to reserve the issue.

Before the jury selection began, the trial court reminded the parties of the strictures of Batson, stating: "I hope that you all comply with that, and we won't have any problems with reference to that."

After the jury was selected, the court conferred briefly with the parties to see if there was "anything the court needs to take up prior to the trial...." Near the end of the conference, the prosecutor asked if "there's a Batson objection...." The court spoke to the defendant's attorney about Batson:

> The Court: Of course, I advised counsel about that in the beginning, and I saw no evidence of that. If you want to make any record, I'll let you make it at this time.
>
> Mr. Allen (for the defendant): Your Honor, I would like to just reserve that objection if I may. I really haven't had a chance to even consider it at this moment in time.
>
> The Court: All right, there's no objection at this time. All right. Bring the jury back, please. Excuse me, did you want a break? Let's take a break for about five minutes.

No Batson issue was raised until after trial and after the defendant's trial attorneys had withdrawn and new attorneys entered the case on behalf of the defendant. The issue was raised for the first time in Spencer's fourth amended motion for

new trial. Spencer contends this delay is not fatal to his claim because the trial court "permitted defense counsel to reserve his right to raise a Batson objection until sometime later in the proceedings." However, the trial court did not explicitly allow counsel to reserve his objection; the court only noted there was no objection "at this time." Even if the court's response were liberally construed to implicitly grant the defendant some additional time to "make [a] record," we do not think the court's response can be interpreted reasonably to allow the defendant to wait until his fourth amended motion for new trial to raise a Batson issue.

In Childs v. State, 257 Ga. 243, 257 (21) (357 SE2d 48) (1987), we held: "A Batson issue must be raised in a timely manner, and after trial is too late." See also State v. Sparks, 257 Ga. 97 (355 SE2d 658) (1987). Because Spencer did not raise this issue in a timely manner, the trial court did not decide whether the defendant had made a prima facie case of discrimination and the trial court did not inquire about and the state did not explain its reasons for the exercise of its peremptory challenges. See Gamble v. State, 257 Ga. 325 (357 SE2d 792) (1987). We hold this claim is not preserved for review.[2]

2. The trial court did not err, as Spencer contends in enumeration 13, by refusing to charge the jury on voluntary

[2] We note the trial jury was evenly split racially, and trial counsel testified at the hearing on the motion for new trial that he "did not see a need to raise a Batson challenge."

manslaughter. Horton v. State, 249 Ga. 871 (1) (295 SE2d 281) (1982). Nothing in Beck v. Alabama, 447 U. S. 625 (100 SC 2382, 65 LE2d 392) (1980), requires a trial court to instruct the jury on a lesser offense where the evidence fails to warrant such a charge. Hopper v. Evans, 456 U. S. 605 (102 SC 2049, 72 LE2d 367) (1982).

3. Enumeration 14 alleges Spencer's death sentence was the result of racial discrimination. See McCleskey v. Kemp, 481 U. S. 279 (107 SC 1756, 95 LE2d 262) (1987). Spencer relies upon a post-trial affidavit from one of the jurors stating she overheard two white jurors making racially derogatory comments about the defendant during the jury's deliberations.

The general rule is that "affidavits of jurors may be taken to sustain but not to impeach their verdict." OCGA § 17-9-41. Exceptions are made to this rule in cases where extrajudicial and prejudicial information has been brought to the jury's attention improperly, or where non-jurors have interfered with the jury's deliberations. See, e.g., Hall v. State, 259 Ga. 412 (3) (383 SE2d 128) (1989) and cases cited therein. Compare FRE 606 (b).[3]

[3] FRE 606 (b) provides: "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these

The affidavit here does not fit within these exceptions to the rule. Compare Shillcutt v. Gagnon, 827 F2d (1155) (II) (7th Cir. 1987). See also Wright and Gold, Federal Practice and Procedure, ch. 7, § 6074, at pp. 431-32. ("Most authorities agree ... that the rule precludes a juror from testifying that issues in the case were prejudged, a juror was motivated by irrelevant or improper personal considerations, or racial or ethnic prejudice played a role in jury deliberations." (Footnotes omitted)).

The rule against allowing jurors to impeach their verdict serves important public interests. The rule discourages post-verdict harassment of jurors, enhances verdict finality and certainty, encourages free and open discussion among jurors during deliberations, and insulates jury value judgments from judicial review. However, these goals are not absolute, and it has been held that the rule of juror incompetency "cannot be applied in such an unfair manner as to deny due process." Shillcutt v. Gagnon, supra at 1159; Williams v. State, 252 Ga. 7 (1) (310 SE2d 528) (1984); Dobbs v. Zant, 720 F. Supp. 1566 (III) (N.D. Ga. 1989). See also Wright and Gold, supra at 437, n. 104 ("It is safe to say that Rushen [v. Spain, 464 U. S. 114 (104 SC 453, 78 LE2d 267) (1983)] at least stands for the proposition assumed in Smith [v. Phillips, 455 U. S. 209 (102 SC 940, 71 LE2d 78) (1982)] that juror testimony as to the effect of bias on decision making may sometimes be received over a Rule 606 (b) objection.")

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purposes."

Spencer contends his affidavit should have been considered notwithstanding the rule of exclusion, and that his conviction and death sentence should be reversed on the basis of the affidavit. We disagree.

> In cases too numerous to mention, the courts have moved decisively against procedures that attach a badge of inferiority to certain groups. This protection is needed even more critically in the courtroom setting, which is designed to assure equal justice to all. [Avery v. State, 174 Ga. App. 116, 119 (329 SE2d 276) (1985)]

The rule of juror exclusion, however, is sufficiently race-neutral that further protection is not required, and the evidence in the present case did not reach a level that would justify disregarding the rule. Other than the lone affidavit, Spencer offered no evidence that racial bias materially affected the jury's decision to convict him and to impose a death sentence. Compare Dobbs v. Zant, supra, 1574-1579 (summarizing evidence presented on McCleskey claim). Moreover, assuming the truth of the affidavit, it shows only that two of the twelve jurors possessed some racial prejudice and does not establish that racial prejudice caused those two jurors to vote to convict Spencer and sentence him to die. The trial court did not err by refusing to consider the affidavit. Compare Tanner v. U. S., 483 U. S. 107 (107 SC 2739, 2751, 97 LE2d 90) (1987) ("District Court did not err in deciding, based on the inadmissibility of juror testimony and the clear insufficiency of the non-juror evidence offered by petitioners, that an additional post-verdict evidentiary hearing was unnecessary.")

4. Spencer argues in his fifteenth enumeration that the state offered impermissible "victim-impact" evidence in violation of Booth v. Maryland, 482 U. S. 496 (107 SC 2529, 96 LE2d 440) (1987). The evidence he complains about consists of two photographs of the victim, one taken while he was alive and one showing him deceased. In a murder case, the state has to prove beyond a reasonable doubt that the defendant "cause[d] the death of another human being." OCGA § 16-5-1. The two photographs were relevant to an essential element of the crime of murder. There was no violation of Booth here. Moon v. State, 258 Ga. 748 (16) (375 SE2d 442) (1988). Nor do we find meritorious his 21st enumeration in which he contends the photograph showing the victim after he was killed should have been excluded on grounds of gruesomeness. See Brown v. State, 250 Ga. 862 (302 SE2d 34) (1983).

5. Following a Jackson-Denno hearing, the state introduced evidence of a statement given by the defendant to an investigator explaining how he had obtained and concealed the murder weapon. At the hearing, the investigator testified he spoke to the defendant with the permission of the attorney who was then representing the defendant. (The statement was obtained in 1974.) Based on this unrefuted testimony, the trial court admitted the statement. Now, relying on portions of the original trial transcript not introduced at this retrial, Spencer contends in his 16th and 17th enumerations of error that the statement was taken in violation of his right to counsel.

The statement at issue was, in toto: "A trustee had given [the gun] to [Spencer], and he had dismantled it and hid it over the shower for a number of days prior to being transported." In view of testimony by another inmate that he saw Spencer in possession of the gun at the jail, and the unrefuted testimony that Spencer was in possession of a gun while he was being transported, any possible error in the admission of this statement is harmless beyond a reasonable doubt.

6. We do not find that the state suppressed material evidence, favorable to the defendant, that was known to the prosecution but unknown to the defense. (Enumerations 18 and 20.) Hence, we find no violation of Spencer's rights under Brady v. Maryland, 373 U. S. 83 (83 SC 1194, 10 LE2d 215) (1963). See Parks v. State, 254 Ga. 403 (3) (330 SE2d 686) (1985); Castell v. State, 250 Ga. 776 (2) (301 SE2d 234) (1983).

7. In his 19th enumeration, Spencer complains of the state's use of his prison records to cross-examine Spencer after Spencer testified on direct about his good behavior in prison. There was no objection at trial to this aspect of the state's cross-examination, and this issue is not preserved for review.

8. In his 22nd enumeration, Spencer contends the court erred in a number of its evidentiary rulings. Spencer complains of these rulings: (a) The trial court limited the re-direct examination of the defendant on the ground that it was repetitious of matters already brought out on direct and cross-examination. (b) The trial court allowed a state's witness to

testify over objection that his investigation had uncovered no evidence that Spencer fired a warning shot before firing at either of his victims. (c) The trial court allowed this witness to describe the scene depicted in a photograph while displaying it to the jury. (d) The trial court allowed the state to ask Spencer on cross-examination whether Spencer (who admitted killing the victim) had killed with "malice aforethought." (e) The court allowed a witness to testify that stains shown in a photograph were bloodstains.

The trial court enjoys a wide discretion in determining the admissibility of evidence. Lee v. State, 258 Ga. 762 (6) (374 SE2d 199) (1988); Hicks v. State, 256 Ga. 715 (13) (352 SE2d 262) (1987). Compare U. S. v. Metallo, 908 F2d 795 (11th Cir. 1990). We find no abuse of discretion here.

Spencer also complains of the admission of the handcuff key in evidence. There was no objection to this evidence at trial.

In addition, he complains that a photograph not admitted in evidence was displayed to the jury. There was no objection to this display. Moreover, although, probably through inadvertence, the state did not formally offer this photograph in evidence, it apparently was treated as evidence by all parties. (A copy is included in the transcript at p. 1040, with other photographs admitted in evidence). See Clayton v. State, 149 Ga. App. 374 (1) (254 SE2d 518) (1979).

The identification of the murder weapon was sufficient. Ramey v. State, 238 Ga. 111 (4) (230 SE2d 891) (1976).

Contrary to the defendant's contention, a trial court may allow a witness to read from his notes if the witness had personal knowledge of the matters referred to. OCGA § 24-9-69; Mincey v. State, 257 Ga. 500 (6) (360 SE2d 578) (1987).

Finally, a trial court retains the discretion to allow leading questions on direct examination. OCGA § 24-9-63. There was no abuse of that discretion in this case.

9. In his 23rd, 24th and 28th enumerations of error, Spencer contends the district attorney and the trial court attempted to "orchestrate" a death sentence and were guilty of misconduct. Almost all of Spencer's allegations of prosecutorial misconduct relate to the prosecutor's opening statements, closing arguments, or the evidence of prior crimes, and are complaints raised for the first time after trial. The contemporaneous objection rule cannot be avoided by characterizing trial occurrences as examples of prosecutorial misconduct. In this case, prosecutorial conduct not objected to at trial will not warrant reversal on appeal. See Skipper v. State, 257 Ga. 802 (3) (364 SE2d 835) (1988).

The defendant's allegations concerning the trial judge are not particularly helpful. If the court committed error, or abused its discretion, such matters can better be addressed directly than by filling a single enumeration of error with a "laundry list" of rulings by the court, many of which are addressed elsewhere in the defendant's brief and in this opinion. For example, we have held that the court did not abuse its

discretion in the conduct of the voir dire examination, and have addressed the court's rulings on the qualifications of specific jurors. See Division 1 of this opinion.

Spencer complains the court "pushed the trial to completion by holding court well beyond 5:00 p.m. each day." A trial court retains the discretion to determine how late to hold court before recessing for the evening. Although it is likely that such discretion could be abused, Spencer does not even try to demonstrate any abuse here.

In addition, Spencer contends the court allowed misconduct by state personnel. For example, he contends the court allowed the district attorney's investigator "to indicate his approval or disapproval of the testimony of various witnesses by nodding [or shaking?] his head..." The only reference in the transcript to this is at p. 678, when Spencer's attorney brought the matter to the court's attention at a bench conference. The court replied, "I'll tell him. I've noticed that, too." No further relief was sought by the defendant, and the matter was not raised again. We do not find that the court "allowed" misconduct by state personnel.

We find no merit to these enumerations of error.

10. In his first five enumerations of error, Spencer raises issues about the prosecutor's introduction of Spencer's criminal record of convictions based on guilty pleas.

We remanded this case previously (see fn. 1), noting that these convictions based upon guilty pleas were used in

aggravation of sentence, and directing the superior court, in light of Johnson v. Mississippi, U. S. (108 SC 1981, 100 LE2d 575) (1988), to determine whether Spencer's guilty pleas were knowing, intelligent and voluntary. See Cook v. Zant, 259 Ga. 299 (379 SE2d 780) (1989).[4]

On March 3, 1970, Spencer pled guilty to one count of rape, two counts of assault with intent to rape, two counts of kidnapping, one count of assault with intent to murder and two counts of motor vehicle theft. There is no transcript of the plea colloquy. However, the trial judge who had accepted these pleas in 1970 testified at the hearing on remand. Judge Fleming identified a form he invariably used in 1970 when accepting guilty pleas. The form contained a list of questions to ask the defendant and his attorney. The questions to the defendant probed his educational background, his understanding of the charges against him and of his right to a jury trial, and whether the defendant was entering his plea freely and voluntarily.[5] The

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[4] In Johnson v. Mississippi, supra, the U. S. Supreme Court reversed a death sentence based in part on a conviction set aside in habeas proceedings after the death sentence had been imposed. In Cook v. Zant, we granted habeas relief on a 1950 murder conviction that had been used in aggravation in a 1985 death-penalty case. See Cook v. State, 255 Ga. 565 (340 SE2d 843) (1986).

[5] The questions to be asked the defendant were, verbatim:

1. Are you the named John Doe in the indictment?
2. Do you understand the nature of the charges against you?

Note: At this stage an explanation of the charges might be necessary for the protection of the transcript, and the indictment should be read to the defendant.

attorney would be questioned to determine if he had consulted with the defendant, explained to him his rights, discussed the charges and explained the consequences of a guilty plea, and whether any reason might exist not to accept the plea.[6]

Judge Fleming testified he was confident that he would not have accepted a plea unless satisfied that it was knowing,

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3. Do you understand the English language?
4. How far did you proceed in school?
5. Can you read and write?
6. Have you consulted with counsel?
7. Do you understand that you have a right to plead either "guilty" or "not guilty?"
8. If you plead "not guilty," you will be entitled to a trial before a jury; but in the event you plead "guilty," this court will impose a sentence as provided by law.
9. Do you wish to enter a guilty plea?
10. Do you understand the meaning and the consequences of a guilty plea?
Note: In most cases, if not in all cases, the defendant ought to be informed as to the maximum sentence provided by law.
11. Have you been promised a lesser sentence or easier treatment or threatened into making a guilty plea?
12. Is this plea made of your own will--that is freely and voluntarily?
13. Please give me some of the facts surrounding your case, or your participation in the alleged criminal activity.

[6] The questions to the attorney were:

1. Mr. Attorney, have you had an opportunity to consult with the defendant?
2. Have you explained to him his legal and constitutional rights?
3. Have you discussed the charges against the defendant, and explained to the defendant the consequences of a guilty plea?
4. Mr. Attorney, is there any defense or any defect in either the process or the procedure in this case, or is there any other matter which could or should act to prevent the defendant from entering a plea of guilty or the court from accepting such a plea?

intelligent and voluntary.

On October 31, 1974, Spencer pled guilty to one count of attempted escape. Judge Fleming presided over this guilty-plea proceeding also. Again, there apparently is no transcript of the guilty-plea hearing. However, Judge Fleming testified that in 1974 he relied upon a guilty-plea questionnaire filled out and signed by the defendant with the assistance of counsel, as well as personal questioning of the defendant. The record contains (1) the questionnaire signed by the defendant, (2) a certificate of the defendant's attorney stating that the attorney had investigated the case, reviewed the questionnaire with the defendant and assured himself that he understood the questions, and (3) an order signed by the trial court finding that based on "questioning the defendant and his counsel" and on the "plea, acknowledgment and waiver," the defendant's plea was knowingly, intelligently and voluntarily entered.

(a) Spencer argues it was error to give the state an additional opportunity to present evidence on remand. We disagree. The trial court originally decided the guilty-plea issue on procedural grounds. Remanding the case to give the state an opportunity to present evidence on the merits of this issue did not subject the defendant "to be twice put in jeopardy of life or limb," U. S. Constitution, 5th Amendment. See, Lockhart v. Nelson, 488 U. S. (109 SC 285, 102 LE2d 265) (1988); Hall v. State, 244 Ga. 86 (259 SE2d 41) (1979).

(b) Spencer's guilty pleas were admitted without objection

at trial. They were offered at the guilt phase of trial because Spencer was charged with the offense of escape and it was necessary to prove that he had been convicted of a felony and was in lawful custody. OCGA § 16-10-52 (a) (1). They were relevant at the sentencing phase as general evidence in aggravation, OCGA § 17-10-2, and the conviction for rape was relevant to prove the § b (2) statutory aggravating circumstance. See OCGA § 17-10-30 (b) (1).

Our remand order was not a ruling that the state's procedural objections to raising this issue were not valid. In Pope v. State, 256 Ga. 195, 209 (17) (345 SE2d 831) (1986), we held that "once the defendant raises the issue of knowing and voluntary waiver with respect to prior guilty pleas, the burden is on the state to establish a valid waiver." Since Spencer did not object at trial to the use of his prior convictions, we hold it was not error to admit them without proof by the state that Spencer had knowingly, voluntarily and intelligently entered his pleas of guilty.

However, with the benefit of the evidence presented at the hearing on remand, we now conclude, alternatively, that the state has proven satisfactorily that Spencer's guilty pleas were valid.

(c) We do not find that the prosecutor's cross-examination of the defendant at trial about his guilty pleas "amounted to unsworn testimony" as the defendant contends. Each party is entitled to a thorough and sifting cross-examination. OCGA § 24-9-64. Leading questions are allowed. OCGA § 24-9-63. There was

no abuse of discretion by the trial court. Mullins v. State, 157 Ga. App. 204 (4) (276 SE2d 877) (1981).

(d) The trial court did not err by failing to give a limiting instructing to the jury about the guilty-plea evidence where the defendant did not request such an instruction.

11. In his 25th enumeration of error, Spencer contends he was denied effective assistance of counsel. See Strickland v. Washington, 466 U. S. 668 (104 SC 2052, 80 LE2d 674) (1984).

Spencer was represented at trial by Benjamin Allen and Sheryl Hudson. Allen contacted the ACLU and several attorneys from Augusta to obtain information and advice about trying death penalty cases. He conferred with John Ruffin, who had represented Spencer at his first trial. Allen and Hudson interviewed all of the state's witnesses who would talk to them, and read the transcript from the first trial. They filed numerous pretrial motions and were granted funds to employ a psychologist to examine the defendant and to employ a sociologist to assist with jury selection.

In light of Spencer's criminal record and the strong evidence of guilt in this case, coupled with his good behavior in prison for the past 10 years, defense counsel decided to take the approach that Spencer had once been wild and uncontrollable but had changed for the better.

Allen testified that he did not investigate the voluntariness of the prior guilty pleas because he had discussed them with Spencer and Spencer had told him the pleas were

voluntary. Moreover, the crimes all pre-dated 1974, and the evidence was consistent with the defense strategy of proving Spencer's improved behavior.

Spencer contends his trial attorneys failed to conduct an adequate cross-examination of some of the state's witnesses. Allen, however, testified that these witnesses were favorable in some respects to the defendant, and he made a strategic decision not to try to discredit their testimony.

Spencer's strongest attack, however, is that his trial attorneys failed to present the testimony of witnesses who, Spencer claims, could have presented important evidence in mitigation at the sentencing phase of the trial.

Allen explained why he did not present the testimony of these witnesses. He testified that he was given a list of potentially mitigating witnesses by the defendant, and he tried to contact all of them. He was unable to contact Julie Lockhorn, who lives in Cincinnati, despite repeated efforts to do so. Allen pleaded with Joanna Gibson to testify on Spencer's behalf, but she stated she did not want to testify on the defendant's behalf. Allen testified: "[M]y position, if you've got a character witness that does not want to come down, leave them alone, because basically she has nothing good to say." Allen contacted Claude McCann, a counselor at the Georgia Diagnostic Center. McCann told Allen that "it was his feeling that Spencer had not changed." Other prison officials Allen contacted told him that Spencer had not changed and they could say nothing

helpful to the defendant.

Spencer's trial attorneys presented mitigating evidence available to them. We find that Spencer has failed to overcome the strong presumption that his trial attorneys effectively represented him. See Cook v. State, 255 Ga. 565 (17) (340 SE2d 843).

12. In his 26th enumeration, Spencer claims the trial court erred by permitting jury deliberations to continue when one of the jurors was ill.

All the transcript shows is that just before closing arguments began at the guilt phase of the trial, the court stated:

> I understand one of the jurors is not feeling too well. We are going to try to get you some whatever you need to help you and get it to you just as soon as we can.

Then, the court interrupted the district attorney's closing argument:

> Mr. Sibley, excuse me just a minute. This man ... one of the men on the jury has a stomach disorder and they sent over and got something he said he could take and help him through this.

Spencer did not object, and the record does not show that this juror was too ill to continue.

13. Next, Spencer argues he should have been granted a continuance to give him time to evaluate his prison records which arrived the first morning of jury selection. Spencer did not ask for a continuance, and has not shown he needed additional time to review these records. There was no error.

14. That the trial court's order denying the defendant's

motion for new trial purported to find the grounds thereof "individually and collectively to be without merit" does not mean this court must address the merits of issues not timely raised at trial. Enumeration 29 is without merit.

15. In enumeration 30, Spencer contends the state refused to provide court-ordered discovery during the proceedings on remand. Spencer sought to review records of his guilty pleas and, as well, records in other cases of guilty pleas taken in Richmond County between 1969 and 1974. Some of the records he sought were in the custody of the Clerk of Court and the Director of the "Richmond County Retention Center." Apparently, pertinent information in the custody of the prosecutor or law enforcement agencies was furnished as requested. Moreover, as the district attorney argued below:

> The defendant's motion [to compel] shows on its face, in paragraph 5, that the clerk produced the requested records and allowed counsel the right of inspection. The fact that the Clerk apparently does not have custody of records sought by the defendant is not inconsistent with the fact that the [defense] has located plea transcripts in [records of] habeas corpus hearings [involving Burke County cases].

The district attorney noted that the Clerk was an independent official not under his direction or control, and suggested that the defendant bring the clerk into court to speak for himself. See, e.g. OCGA § 50-18-73. This the defendant failed to do. The trial court did not err by denying the defendant's "motion to compel." Supp. Record at 249-50.

16. The trial court did not abuse its discretion by refusing to grant a continuance at the sentencing phase of the

trial to await the arrival of a witness who was not under subpoena, whose whereabouts were not known for sure, who had corresponded with the defendant but had only seen him a few times in prison, and whose possible testimony the court was informed about only on the afternoon of the last day of trial. See Wilson v. State, 250 Ga. 630 (8) (300 SE2d 640) (1983); OCGA § 17-8-25.

17. In his 32nd and 33rd enumerations, Spencer complains about the court's instructions on mitigating circumstances. While we do not see any reason to instruct a jury to list on the verdict form the mitigating circumstances it has found, we find no constitutional error. The trial court defined "evidence in mitigation" but cautioned the jury:

> Now, members of the jury, I charge you, you may ... and this is a matter entirely in your discretion, recommend a life sentence for the accused on this charge based upon any mitigating circumstance or reason satisfactory to you or without any reason, if you, the jury, see fit to do so, in this case.
>
> I further charge you that you may sentence the defendant to life imprisonment although you find any or all the previously mentioned alleged aggravating circumstances to be present in the case and even though no mitigating circumstance or circumstances are found to exist in the case.

These instructions were repeated later in the charge. The court's charge did not impermissibly limit the jury's consideration of mitigating evidence. See Romine v. State, 251 Ga. 208 (10 b) (305 SE2d 93) (1983).

18. In his 35th enumeration, Spencer complains about the court's response to a jury question during its sentencing deliberations. However, the defendant agreed at trial with the

court's response, and may not now complain about it.

19. The jury's written finding on the § b (1) circumstance referred to a prior record of "convictions" (plural). Spencer contends that since evidence shows only one capital felony conviction for rape, the evidence is insufficient to support the jury's § b (1) finding. See OCGA § 17-10-30 (b) (1).

The state presented no evidence that Spencer had more than one conviction for rape. Moreover, it was not disputed that he had that one conviction for rape. We note there was no objection to the form of the verdict, Potts v. State, 259 Ga. 96 (22) (376 SE2d 851) (1989), and find that the jury's § b (1) finding is supported by the evidence.

20. While the state may not argue that the defendant might be paroled, OCGA § 17-8-76, the state is permitted to argue that a defendant's probable future behavior "indicates a need for the most effective means of incapacitation, i.e., the death penalty...." Ross v. State, 254 Ga. 22, 34 (7) (326 SE2d 194) (1985). The prosecutor did not err by arguing that, based on his record, Spencer is an escape risk.

21. Out-of-state counsel volunteered to represent the defendant after he was convicted and sentenced to death. A local attorney also represented the defendant for a short time but then withdrew. Spencer claims he withdrew because of pressure from the victim's daughter whom he describes as an elected official in Richmond County, and contends it amounted to state interference with his right to counsel. However, although the court was

willing to hear from the local attorney about why he had withdrawn, Spencer declined to present his testimony. His legal contentions are therefore without factual support.

22. The issue of attorney fees for Spencer's original trial attorneys is not properly before this court. Moon v. State, 258 Ga. 748 (6) (375 SE2d 442) (1988).

23. The court did not err as contended in enumeration 41, by denying Spencer's motion for reconsideration of the denial of his motion for new trial.

24. We do not find that the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factor. OCGA § 17-10-35 (c) (1).

25. The jury found three statutory aggravating circumstances: § b (1), § b (9) and § b (10). The evidence supports these findings beyond a reasonable doubt. OCGA § 17-10-35 (c) (2).

26. The sentence of death is neither excessive nor disproportionate, considering both the crime and the defendant. OCGA § 17-10-35 (c) (3). The similar cases listed in the Appendix support the imposition of a death sentence in this case.

Judgment affirmed. All the Justices concur.

APPENDIX.

Kinsman v. State, 259 Ga. 89 (376 SE2d 845) (1989); Morrison v. State, 258 Ga. 683 (373 SE2d 506) (1988); Cook v. State, 255 Ga. 565 (340 SE2d 843) (1986); Walker v. State, 254 Ga. 149 (327 SE2d 475) (1985); Mincey v. State, 251 Ga. 255 (304 SE2d 882) (1983); Stevens v. State, 247 Ga. 698 (278 SE2d 398) (1981); Tucker v. State, 245 Ga. 68 (263 SE2d 109) (1980); Collier v. State, 244 Ga. 553 (261 SE2d 364) (1979); Davis v. State, 241 Ga. 376 (247 SE2d 45) (1978); Stephens v. State, 237 Ga. 259 (227 SE2d 261) (1976).

SUPREME COURT OF GEORGIA

ATLANTA DECEMBER 19, 1990

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Case No. S90P0921

JAMES LEE SPENCER V. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk.

IN THE SUPERIOR COURT OF

BURKE COUNTY, GEORGIA

STATE OF GEORGIA	)	INDICTMENT NO. 87-R-65
	)	
VS	)	APRIL TERM, 1987
	)	
JAMES LEE SPENCER	)	ORDER

On September 22, 1988, the defendant's Fourth Amended Motion for New Trial came on before me for hearing in the Burke County Superior Court. At that hearing the Court heard the testimony of Mr. Benjamin Allen, the attorney who was the defendant's principal counsel at trial. Mr. Allen's testimony dealt with the issue of his competency as trial counsel and the Court listened to it carefully and has given it great consideration. The Court notes that ground 57 of the defendant's motion makes numerous allegations of ineffective assistance of counsel.

After having heard Mr. Allen's testimony, this Court concludes that the quality of Mr. Allen's representation did not fall below an objective standard of reasonableness. See Williams v. State, 258 Ga. 281, 286(7), 368 S.E. 2d 742 (1988). Most, if not all, of the defendant's allegations of ineffective assistance were thoroughly and completely explained by Mr. Allen as being matters of trial strategy. The reasonable choices that an attorney makes with regard to trial strategy are not matters that constitute ineffective assistance such as will mandate a new trial. McDuffie v. Jones, 248 Ga. 544, 550(4), 283 S.E. 2d 601 (1981). In any event, the defendant suffered no prejudice on account of defense counsel's

alleged errors and omissions when they are considered in the light of the strength of the State's case and the ample evidence supporting the aggravating circumstances which authorized the imposition of the death penalty. Reese v. State, 257 Ga. 624, 361 S.E. 2d 796 (1987).

This Court finds that Mr. Allen represented the defendant in a constitutionally adequate, effective and indeed exemplary manner.

The Court has further examined all of the other grounds set forth in the defendant's motion and it finds them individually and collectively to be without merit.

Accordingly, the defendant's Fourth Amended Motion for a New Trial is DENIED as to each and every ground thereof.

SO ORDERED, this 3rd day of October, 1988.

FRANKLIN H. PIERCE
J.S.C.A.J.C.

Presented by:

CHARLES R. SHEPPARD
Assistant District Attorney
Augusta Judicial Circuit

401 Walton Way, Suite 2121
Augusta, Georgia 30911

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this date served a copy of the within and foregoing ORDER upon Mr. JOHN (JACK) PAUL BATSON, Attorney at Law, 303 Telfair Street, Augusta, Georgia 30901, counsel for the defendant, James Lee Spencer, by depositing same in the United States Mail with sufficient postage attached thereon.

This 3 day of October, 1988.

CHARLES R. SHEPPARD
ASSISTANT DISTRICT ATTORNEY
AUGUSTA JUDICIAL CIRCUIT

SAM B. SIBLEY, JR.
DISTRICT ATTORNEY
JOINT LAW ENFORCEMENT CENTER
401 WALTON WAY - Room 2121
AUGUSTA,, GA. 30911-2121
(404) 821-1135

/CRS

AFFIDAVIT

STATE OF GEORGIA)
: ss.:
COUNTY OF BURKE)

ELLA PEARL MOORE, being duly sworn, deposes and says:

1. I was a member of the jury which convicted and sentenced to death defendant James Lee Spencer on September 3, 1987. I have lived in Burke County all of my life.

2. I know that race and racial bias was a significant factor that some of the jurors used in reaching their decision in this case.

3. During jury deliberations in the guilt/innocence phase, a white female juror made racially derogatory statements in the jury room, including the statement, referring to the defendant, that "A nigger deserves to be dead." That juror was in her 20's, stout and a resident of Waynesboro, Georgia. I believe she was employed as a secretary. I do not know her name.

4. Another white juror, Charles McLeroy, also made similar racially derogatory comments about the defendant during jury deliberations. I have personally known Mr. McLeroy for many years and believe him to be racially prejudiced.

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5. Based on those juror statements and my observations as a juror in the jury room, I know that defendant's race was an important factor in certain juror's decisions to convict defendant and sentence him to death.

Ella Pearl Moore

Sworn to before me this
day of June, 1988.

Notary Public

6-9-88

Ella P. Moore

Sworn to before me this
9th day of June, 1988

Notary Public

IN THE SUPERIOR COURT OF BURKE COUNTY

STATE OF GEORGIA

STATE OF GEORGIA, :

- against - : Indictment No. 87-R-65

JAMES LEE SPENCER, : April Term, 1987

Defendant. :

County of Multnomah)
: ss.:
State of Oregon)

LEAH KIRTLAND, being duly sworn, deposes and says:

1. I am submitting this affidavit to describe in detail the unique relationship our family has had with James Lee Spencer for the last ten years. I have a son who is a sophmore at the University of Oregon and a daughter who is a sophmore in high school. My children, my ex-husband and myself have corresponded with and have visited with James for the past decade and throughout those years, we have grown to love James very much and consider him to be a part of our family.

2. My family and I began corresponding with James in September of 1978. Since that time, we have written to him on an average of twice a week. In addition, we have been in contact by telephone with James at least every other month for approximately seven years. Through that ongoing relationship, we have come to know James in a special way and I believe have developed a very personal and individualized relationship with him.

3. During the first four years we wrote and spoke with James, we were not allowed to be on his visitation list at the prison, as we were not immediate family members. During that time, however, we learned to know about his life and his faith, and we took an active interest in his life in prison.

4. For example, in the fall of 1979, about a year and one-half after James was transferred from the Georgia State Penitentiary to the Georgia Diagnostic and Classification Center in Jackson, he was subjected to numerous threats by other inmates and at least three attempts on his life were made. Out of our concern for his welfare, we wrote to Mr. William Lowe, at the Department of Offender Rehabilitation to express our concern for his safety and to request that James be moved back to the Georgia State Penitentiary or to some other facility. See letter from Richard and Leah Kirtland to Mr. William Lowe, dated October 6, 1979. After James was attacked by another inmate, we wrote to United States District Judge Wilbur Owens again requesting that he intercede on James' behalf. See letter from Dick and Leah Kirtland to Honorable Judge Wilbur Owens, dated October 24, 1979. Although those efforts were not successful, it taught us to understand the dangerous and frustrating circumstances under which James was living and helped us appreciate how difficult the rehabilitative process is in that environment.

5. After repeated efforts, we were finally granted visitation rights, and I went to see James for the first time in December of 1983. James surprised me. He was not the angry, hostile, young man I expected to meet at all. Instead, he radiated a sense of caring, and compassion and peace.

6. That first time that I visited James was a difficult time in my life. Although I went to the prison in an effort to do something good for James, I honestly felt that he did something for me by giving me a new strength that helped me get through that period. I honestly walked away from that December 1983 visit feeling ashamed for myself that a person in his situation could work so hard to help me.

7. It was during that first visit that I began to appreciate James' development over the years that I had known him and the real commitment to God and his faith he had made while he was in prison. Several attempts had been made on his life while he was in the penitentiary. The first time I visited him, however, I witnessed the true meaning of forgiveness. One of the men that had injured him physically was with us in a very small visiting area. James introduced us and told me that he had gone to the man and assured him that he had forgiven him and held no grudge or any hard feelings. James has demonstrated that type of attitude over and over again throughout the years. In him I see no anger or hostility, only sincere sorrow for any pain or suffering he has caused others.

8. Another example of James' maturity is how he has dealt with the adversity in prison. For example, twice while James and I visited over the last couple of years, we were verbally confronted with what seemed to me to be racial remarks made by personnel at the Diagnostic Center. The last incident occurred when my daughter visited James with me in December of 1987. I am not used to that kind of verbal abuse and I was simply furious that it was directed to James and to us. James' only reaction, however, was an apology to us for having to take the brunt of someone else's ignorance. That incident only reconfirmed the many other times that he has refused to not respond in a negative way to the adverse conditions of prison life. He continues to survive in that "trying" environment and always maintains a positive attitude.

9. As I said above, James' relationship with our family has been very unique. He has never, in all the years we have known him, forgotten us on our birthdays, anniversaries or holidays with a card (oftentimes handmade) and/or handmade gifts. James has never asked for, nor does he expect, anything in return. He "gives" because he truly cares.

10. That special concern for family applies to his own child as well. Although James has been separated from his daughter for many years, he has always remembered her with a card at Christmas, her birthday, and other special holidays. I know it has been a long time since James has seen her. He has loved her from

a distance in order to spare her anymore pain or sorrow. His daughter is now twenty years old, in college, and when James speaks of her, the loss he has suffered is very evident by the tears in his eyes.

11. James is extremely intelligent and I believe he would definitely be an asset to our society. His ministry in life is to help others in every way possible to live good, productive, Christian lives and not to make the same mistakes he has made. He truly cares about people. I believe putting this man to death would indeed be a waste of a fine young man who has so much to offer.

12. Our family have anxiously followed with James, the course of his legal proceedings over the last ten years. When his new trial was scheduled in September, I was more than pleased to offer my assistance in any way possible and to come and testify in his behalf. I feel strongly that our family's long term relationship with James, from a perspective far away from any other people he knew in Georgia, would offer the jury a very different point of view of the man before them. Our long term correspondence with James, and our opportunity to see the changes in him over time, would help the jury understand that this is a very different individual from the young, angry man who was involved with the incidents in 1974.

Exhibit A

13. As I had discussed with Ben Allen, James' trial counsel, I flew from Oregon to Augusta, Georgia on September 3, 1987, so that I could appear as a live witness to this trial. Mr. Allen had expected the trial to last through September 4th. My plane was on time and Mr. Allen's brother-in-law picked me up at the airport and drove me down to Waynesboro to the courthouse.

14. When I arrived, Mr. Allen was making his closing argument to the jury in the sentencing phase. Although I was ready and willing to testify, neither the Court nor Mr. Allen sought to stop the District Attorney's closing argument so that I could get on the stand. Because I could have provided testimony about James which was different than the testimony provided by Mr. Spencer's mother or by Chaplain Leavelle, I do not think the jury was presented with the full story about the kind of person James has become since 1975.

Leah Kirtland
Leah Kirtland

Sworn to before me this
23rd day of August, 1988.

Debra K A Jonsen
Notary Public

My commission expires 02/14/89

October 6, 1979

Mr. William Lowe
Dept. Of Offender Rehabilitation
Room 821, 800 Peach Tree St.
Atlanta, GA 30308

Dear Mr. Lowe,

We are writing to express our deep concern for the safety of an inmate at the Georgia Diagnostic & Classification Center in Jackson & request that he be moved to the Grorgia State Penitentiary or some other facility. There have been at least three attempts on his life and numerous threats. Some time ago he spent 28 days in solitary confinement during which time he lost 40 lbs. Now, we find that unbelievably cruel & quite disgusting. His name is James Lee Spencer, #-76271. Though we're not blood relatives, James is very dear to us & we look upon him as very much a part of our own family.

We have requested permission to visit him & have been denied because we are not his immediate family. We were put on his Receipt Of Fund List but cannot understand why we're not permitted to visit him. Also, in 11 months time, he has only been allowed to telephone us twice. And, that was only after we'd written to Mr. Bishop a number of times.

We have written our attorney asking for assistance also. We'd appreciate your consideration in this matter at your earliest convenience.

Sincerely,

Captain Richard & Leah Kirtland

Richard & Leah Kirtland
Pt. T, Box 3732
Warren, GA 30828

October 24, 1979

Honorable Judge Wilbur Owens
U. S. District Judge
Middle District of Georgia
Macon, Georgia 31202

Dear Judge Owens,

We are writing to express our deep concern for the safety of a man at the Georgia Diagnostic & Classification Center in Jackson and ask for your assistance. His name is James Lee Spencer, A-76271. Three or more attempts have been made on his life in the past few months and the most recent one being only about a week ago. He is presently in isolation due to this incident in which he was forced to defend himself. Another time he had scalding water thrown on him as he lay sleeping. He's also been attacked recently by another inmate with a knife but managed to disarm him without anyone being injured. This happened while the authorities observed and only after the man had been relieved of his weapon did they step in. He also spent twenty-eight days in solitary confinement about six months ago and during that stay lost forty (40) pounds. Now that is unbelievably cruel.

James is very dear to us and we love him as a part of our own family. We've requested permission to visit him a number of times and have been denied because we are not his immediate family. He has very little family even able to visit. One great aunt that he refers to as his mom and that's all. We've also asked and asked and asked for him to be allowed to telephone us and after almost one year he's been able to call twice. We cannot believe the inhumane treatment he's being subject to.

This young man is trying desperately to preserve his life but in the present situation the outlook sure isn't good. We have contacted an attorney and also written to Mr. William Lowe in Atlanta to request that James be moved to another facility.

You know, it looks like nobody will even listen to our plea let alone care enough to take some action. The whole thing is so disgusting. We're certain that place puts Hell to shame. We are really at a loss as to which way to turn for help in this matter. We do appreciate any assistance you can give us and we thank you very much.

Sincerely yours,

Dick & Leah Kirtland

Dick & Leah Kirtland

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Relevant Amendments

United States Constitution

AMENDMENT VIII -- EXCESSIVE BAIL, FINES, PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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AMENDMENT XIV -- CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken on oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or

any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Relevant Statutory Provisions

Official Code of Georgia

16-5-1. Murder; felony murder.

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

(b) Express malice is that deliberate intention unlawfully to take the life of another human being which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

(c) A person also commits the offense of murder when, in the commission of a felony, he causes the death of another human being irrespective of malice.

(d) A person convicted of the offense of murder shall be punished by death or by imprisonment for life. (Laws 1833, Cobb's 1851 Digest, p. 783; Code 1863, § 4217; Code 1868, § 4254; Code 1873, § 4320; Code 1882, § 4320; Penal Code 1895, § 60; Penal Code 1910, § 60; Code 1933, § 26-1002; Code 1933, § 26-1101, enacted by Ga. L. 1968, p. 1249, § 1.)

16-5-2. Voluntary manslaughter.

(a) A person commits the offense of voluntary manslaughter when he causes the death of another human being under circumstances which would otherwise be murder and if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as murder.

(b) A person who commits the offense of voluntary manslaughter, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than 20 years. (Laws 1833, Cobb's 1851 Digest, pp. 783, 784; Ga. L. 1858, p. 99, § 1; Code 1863, §§ 4222, 4223; Code 1868, §§ 4259, 4260; Code 1873, §§ 4325, 4326; Code 1882, §§ 4325, 4326; Penal Code 1895, §§ 65, 66; Penal Code 1910, §§ 65, 66; Code 1933, §§ 26-1007, 26-1008; Code 1933, § 26-1102, enacted by Ga. L. 1968, p. 1249, § 1.)

17-9-41. Use of affidavits of jurors relating to verdict.

The affidavits of jurors may be taken to sustain but not to impeach their verdict. (Civil Code 1895, § 5338; Civil Code 1910, § 5933; Code 1933, § 110-109.)

Relevant Rules

Uniform Superior Court Rules

34.2 Statement of Purposes.

(A) Purposes of Outline of Proceedings.

(1) One purpose of the Outline of Proceedings is to establish a procedure to be utilized by the court, defense counsel and the prosecuting attorney prior to, during and after trial to make certain that all matters which possibly could be raised on behalf of the defendant have been considered by the defendant and his attorney and either asserted in a timely and correct manner or knowingly, voluntarily and intelligently waived.

(2) Another purpose of the Outline of Proceedings is to prevent the occurrence of error to the maximum extent feasible and to correct as promptly as possible any error that nonetheless may occur.

(3) Another purpose of the Outline of Proceedings is to cause the record or transcripts of proceedings to show that possible issues listed on the Checklist are not involved in the case because those principles of law are not applicable to the facts of the case.

(4) If the defendant later is convicted and if the sentence of death is imposed, these procedures will help to assure that the record and transcripts of proceedings will be complete for unified review by the sentencing court and by the Supreme Court of all challenges to the judgment of conviction and to the sentence of death that may be adjudicated on the basis of the record and transcripts.

(B) Purposes of the Checklist.

(1) One purpose of the Checklist is to remind the court, defense counsel and the prosecuting attorney about general and specific categories of error which ought to be avoided in the prosecution of a case in which the death penalty is sought. Some of these errors traditionally or necessarily occur at particular stages of the case. Others conceivably could occur during various stages of the case. The Checklist presently does not include every error which

may occur. Defense counsel may raise any issue whether or not it is listed on the Checklist. The Checklist will be amended periodically to add other grounds of error. All members of the bench and bar are encouraged to make suggestions to this court regarding the inclusion of other grounds of error to the end that the Checklist will become more comprehensive of all errors which should be avoided.

(2) Proper use of the Checklist as a means of avoiding or promptly correcting error will require the court to schedule conferences (see Rules 34.3 and 34.4) during which defense counsel and the prosecuting attorney will be given an opportunity to present, or to schedule for presentation, issues which would be waived if not asserted in the proper and timely fashion. The court shall determine during such conferences whether defense counsel intends to allow the deadline for the raising of any issue on the Checklist to pass without first having properly presented the issue for decision. In the event defense counsel intends to allow a deadline to pass without first presenting an issue for decision, the court shall question defense counsel in the presence of the defendant to determine whether or not defense counsel has explained to the defendant his rights regarding that issue and whether defense counsel and the defendant have agreed not to assert the issue. There questions put to defense counsel by the court and the responses of defense counsel shall be taken down and transcribed by the official court reporter to the end that it will be established that the right of the defendant is being waived knowingly, voluntarily and intelligently after due consideration by the defendant and defense counsel.

The court also shall utilize the Checklist to determine that issues are not involved in the case. For instance, the court may cause the record to show that no issue as to arrest without a warrant is involved in the case because the defendant was arrested pursuant to a warrant. Stipulations of defense counsel and the prosecuting attorney as to such recitals of fact shall be in writing on the record or clearly articulated to the reporter, recorded, transcribed and included in the transcripts of proceedings.

34.5 Review Proceedings.

. . .

(A)11. The hearing on the motion for new trial shall not be limited to the grounds of motion asserted by the defendant. Rather, the trial court shall confer with the prosecuting attorney and defense counsel to make sure that the record or transcript of proceedings adequately reflects: (1) all issues presented by the defendant for adjudication by the court and the action of the court thereon, (2) all issues waived by the defendant by knowingly, voluntarily and intelligently allowing a deadline for issue presentation to pass without having presented the issue in a timely and proper fashion, and (3) all possible issues listed on the checklist that are not involved in the case because the principles of law are not applicable to the facts of the case. The checklist will assist the trial court and counsel in this effort to make sure that the record and transcript of proceedings accurately and completely reflect the issues that were presented and adjudicated, and the potential issues that either were not applicable under the facts of the case or were knowingly, voluntarily and intelligently waived by the defendant after ample time was given to consider the defendant's legal position.